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SINGLE APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-58

No. ~~1129~~

OLIVER T. FEIN,

Petitioner,

vs.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1970
CERTIORARI GRANTED MARCH 8, 1971

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Docket Entries

UNITED STATES DISTRICT COURT
For the Southern District of New York

69 Civil Action File No. 531

OLIVER T. FEIN,

Plaintiff,

—*v.*—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

DOCKET ENTRIES

Date	Proceedings
Feb. 7.69	Filed complaint and issued summons.
Feb. 19.69	Filed summons and returns served as follows: Selective Service System Local Board No. 7 by Col. John W. Brokaw on Feb. 14, 1969
	Selective Service System Local Board No. 7 by Miss Hollander on Feb. 13.69
Feb. 19.69	Filed Notice of Motion re: Pre. Inj. Ret. 3/11/69.
Mar. 6.69	Filed Plaintiffs notice of motion ret. 3.25.69 for an order granting preliminary injunction.

Docket Entries

Date	Proceedings
Mar. 6.69	Filed Plaintiffs memorandum of law in support of motion for Prelim. Injunction, and Statement under Rule 9(g).
Mar. 10.69	Filed stip that motions for temporary and permanent injunction ret. 3.11.69 in room 506 are adj'd to 3.25.69.
Apr. 14.69	Filed Memorandum of Law of defendants.
Apr. 14.69	Filed Affidavit of Martin Paul Solomon, Asst. U.S. Attorney.
Apr. 30.69	Filed Affidavit of Michael B. Standard in support of plaintiff's motions.
June 11.69	Filed Affidavit of Martin Paul Solomon in response to affidavit of Michael B. Standard.
June 11.69	Filed MEMORANDUM OPINION #35932, Tyler, J. Plaintiff's motions are denied, and the defendants' motion to dismiss the complaint is granted. Tyler, J. (mailed notice)
June 19.69	Filed plaintiff's notice of appeal to U.S.C.A. dtd. 6-19-69
June 20.69	Filed Certified Record on Appeal to the U.S.C.A.

COMPLAINT

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

COMPLAINT

Plaintiff, by Rabinowitz, Boudin & Standard, his attorneys, complaining of defendants, alleges as follows:

1. Plaintiff is a citizen of the United States and the State of New York. He is, and at all times hereafter referred to has been, a registrant of Selective Service System Local Board No. 7, 45 S. Broadway, Yonkers, New York.

2. Upon information and belief, defendant Local Board No. 7 is a duly constituted local board of the United States Selective Service System, created by Act of Congress 62 Stat. 618, as amended, 50 App. U.S.C. 460; defendant Selective Service Appeal Board is a duly constituted appeal board of the United States Selective Service System for the Southern Judicial District of New York, created by Act of Congress, 62 Stat. 618,

as amended, 50 App. U.S.C. 460; defendant Col. John W. Brokaw, A.G.C., is the Deputy State Director, Operations Officer, who at all times hereafter referred to acted in the place and stead of the New York State Selective Service Director. Defendant National Selective Service Appeal Board is the duly constituted delegatee of the President of the United States to determine on claims or questions with respect to inclusion for, or exemption, or deferment from, training and service in the Armed Forces of the United States authorized by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460 as implemented by Executive Order 9988.

3. This Court has jurisdiction under 28 U.S. §§1331, 1343, 1361, 1391 and 2201; the matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs and arises under the constitution and laws of the United States, including Stat. , 50 App. U.S.C. 456 (j); 62 Stat. 618, 50 U.S.C. 460, and the First, Fifth and Sixth Amendments of the Constitution of the United States.

4. Plaintiff is a physician, practicing in the field of community and public health, who held a II-S classification during his attendance at Western Reserve University Medical School until his graduation on or about June of 1967.

5. On or about July 19, 1967, plaintiff was classified II-A by his local board by reason of his position as a Rotating Intern in Medicine and Pediatrics, at the Cleveland Metropolitan General Hospital from June 23, 1967 through June 22, 1968. Thereafter, on or about September 17, 1967, plaintiff requested that Local Board No. 7 transmit to him an application form for Conscientious Objector status (SS form 150) indicating that he was conscientiously opposed to war and to the military. On or about September 26, 1967, plaintiff completed and returned the Conscientious Objector application form together with

riders setting forth facts establishing his sincere opposition to participation in war in any form by reason of his religious training and belief, together with a number of reference letters attesting both to the nature of the plaintiff's principle position, to his religious training, and to his sincerity.

6. On November 15, 1967, the plaintiff had an interview with his local board concerning his Conscientious Objector application. The substance of that interview was essentially: (a) a recognition by plaintiff of a Conscientious Objector's obligation to perform alternative service and plaintiff's willingness to perform such; (b) the religious nature of registrant's training and beliefs upon which he based his opposition to participation in war in any form; (c) his sincerity in holding those beliefs. The plaintiff was not permitted by the local board to produce a witness on his behalf who had accompanied him to the interview to attest his sincerity.

7. On the same date, the plaintiff was retained in his II-A classification by his local board and notified that the local board did not feel the registrant should be reclassified as a Conscientious Objector at that time.

8. Thereafter, following I-A classification by the local board on February 14, 1968 plaintiff in timely fashion requested a personal appearance with his local board which was in fact held on May 22, 1968.

9. Following plaintiff's appearance, the local board reopened plaintiff's file and classified him I-O as a Conscientious Objector by a vote of four to zero.

10. Thereafter, on or about June 4, 1968, the defendant Brokaw on behalf of the office of the State Selective Service Director notified the local board and the defendant Appeal Board that he appealed the I-O classification given to plaintiff.

That notification contained no statement of the reasons for the appeal.

11. Upon notification of the State Director's decision to appeal through the local board to plaintiff, the plaintiff on June 10, 1968 wrote to both the local board and the Appeal Board and requested a statement of the State Director's reasons for his appeal. Plaintiff further requested an opportunity to reply or otherwise be heard prior to a consideration and determination of the appeal by his Appeal Board.

This request was followed by a letter from plaintiff's employer, Dean, School of Medicine, Frederick Robbins, M.D., Case Western Reserve University Medical School, dated June 17, 1968 reaffirming his belief in the propriety of the local board's determination of plaintiff's Conscientious Objector status.

12. Notwithstanding the foregoing request, neither the State Director, the local board, nor the Appeal Board at any time prior to its consideration and decision notified plaintiff of the reasons for the appeal by the State Director.

13. On June 20, 1968, the Appeal Board by a vote of four to zero classified the registrant as I-A. That decision and subsequent notification to the plaintiff did not state either the reasons for the appeal or the reasons for the reversal of the Local board's determination that the registrant was to be classified as a conscientious objector (I-O).

14. On or about July 13, 1968, the registrant requested pursuant to 32 CLR 1627.1 that Gen Lewis Hershey, Director, National Selective Service System, appeal to the National Selective Service Appeal Board on his behalf.

15. Thereafter, the office of the National Selective Service Director, upon notice to local board and to the Southern

District Appeal Board, appealed to the National Selective Service Appeal Board (Presidential Appeal No. 16136).

16. Thereafter, on or about November 26, 1968 the National Selective Service Appeal Board by a vote of three to zero sustained the I-A classification found by the Southern District Appeal Board. At no time did the National Selective Service Appeal Board indicate the bases for its action nor did it notify plaintiff of any such reason.

17. On or about July 31, 1968, registrant received a notice to report for induction pursuant to Special Call No. 42 Doctor of Medicine directing plaintiff to submit to induction on September 6, 1968. Thereafter, on August 29, 1968, plaintiff's notice to report for induction was postponed pending review by National Headquarters.

18. Plaintiff has exhausted all administrative remedies available to him.

19. Plaintiff has never failed, neglected or refused to perform any lawful duty required of him under the Military Service and Training Act of 1967 or its provisions or the rules, regulations or directions issued thereto.

20. (A) The statute and regulations pursuant to which defendants and each of them purported to act in appealing from and reversing the local board's finding that plaintiff should be classified as a conscientious objector in Class I-O, more specifically; 50 App. U.S.C. 460 (a)(2), 32 C.F.R. 1626.1, are unlawful and in violation of the Fifth Amendment *due process* clause in that:

(1) They contain no provision requiring notification to a registrant of the reasons for appeal by the State Selective Service Director.

(2) They contain no provision for the statement of bases of decision by appeal board nor any provision for notification to a registrant of the reasons for appeal by the State Selective Service Director.

(B) The actions of the defendants and each of them pursuant to 50 App. U.S.C. 460 (a)(2), 32 C.F.R. 1626.1, and 32 C.F.R. 1627.1 (a, b) are unconstitutional and violate the Fifth Amendment due process clause in that:

(1) No notice was ever given to plaintiff of the reasons, if any, for the decision to appeal the classification by the local board despite requests made therefor by plaintiff.

(2) No opportunity to submit additional information was given to plaintiff prior to forwarding the appeal to the Appeal Board.

(3) No opportunity was given to plaintiff to present rebuttal to the State Director's appeal from I-O classification.

(4) No statement of the bases of the district appeal board nor the National Selective Service Appeal Board decision was ever made, nor was it notified by either appeal board of the reasons for their decision.

21. The induction of plaintiff into the Armed Forces of the United States unless restrained by this Court, will cause plaintiff irreparable injury and damage in violation of his rights for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) that a permanent injunction issue restraining defendants, their agents, servants and employees, from ordering or otherwise undertaking the induction of plaintiff into the Armed Forces of the United States;

(b) that pending the hearing and determination of plaintiff's request for permanent relief a preliminary injuction issue restraining the defendants and each of them from ordering plaintiff to report for induction into the Armed Forces of the United States;

(c) that the Court adjudge the reclassification of plaintiff by Appeal Board as null and void and of no legal effect to alter plaintiff's prior I-O classification under the Military Selective Service Act of 1967;

(d) that the Court declare that Selective Service Regulations C.F.R. 1626.1, 1627.1 (a, b) on their face or as applied to plaintiff herein violate the United States Constitution;

(e) that the Court order plaintiff restored to his I-O classification;

and for such other and further relief as the Court deems just.

/s/ _____

Michael B. Standard
Rabinowitz, Boudin & Standard
30 E. 42nd Street
New York, New York 10017
OX 7-8640

Attorneys for Plaintiff

February 7, 1969

Notice of Motion of Plaintiff for Preliminary Injunction, Permanent Injunction and Declaratory Judgment

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the Complaint herein, the affidavit of OLIVER T. FEIN, sworn to the 6th day of February, 1969, and the exhibits annexed thereto, the undersigned will move this court at a Motion Part thereof to be held in Room 506, United States Court House, Foley Square, New York, New York on the 18th of February, 1969 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting plaintiff a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a permanent injunction and for declaratory judgment and for such other and further relief as this court may deem just and proper.

February 10, 1969

/s/Michael B. Standard
RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
OX 7-8640

Attorneys for Plaintiff

Notice of Motion

To: SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 7, Yonkers, New York

SELECTIVE SERVICE APPEAL BOARD
FOR THE SOUTHERN DISTRICT OF
NEW YORK

COL. JOHN W. BROKAW, Acting Director,
New York Selective Service System

NEW YORK STATE SELECTIVE SERVICE DIRECTOR

NATIONAL SELECTIVE SERVICE APPEAL BOARD

Affidavit of Oliver T. Fein in Support of Motion for Preliminary Injunction, Permanent Injunction and Declaratory Judgment

UNITED STATES DISTRICT COURT
Southern District of New York

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

---

AFFIDAVIT

OLIVER T. FEIN, being duly sworn, deposes and says:

1. I am a registrant of Selective Service Local Board No. 7, 45 S. Broadway, Yonkers, New York (SS No. 30 7 40 172) and the plaintiff in the above captioned action. I make this affidavit in support of a motion for an order enjoining the defendants from requiring me to report for or submit to induction. The action is predicated, *inter alia*, upon the failure of the State Selective Service Director, and the two appellate review Boards within the Selective Service System, to state the reasons for their reversal of the finding and classification of my Local Board that I was a conscientious objector and entitled to a I-O classification.

2. I am a doctor of medicine, currently engaged as a physician in the field of community and public health. Immediately prior to this employment, I completed an internship program in Medicine and Pediatrics at the Cleveland Metropolitan General Hospital following my graduation from Western Reserve Medical School in June 1967. Local Board No. 7 had

on July 19, 1967, given me a II-A deferred classification for performance of work in the national interest. The duration of that deferment was one year, until June of 1968.

3. In mid-September, 1967, following a profound evaluation of the religious and moral implications of war and the institutions which implement war, particularly in relation to my role as physician and healer, I came to the conclusion that I was opposed to participation in war in any form.

On September 12, 1967, I wrote to my Local Board asserting my convictions and requesting SSS Form #150, a conscientious objector form. (A copy of the letter is annexed hereto as Exhibit A.)

4. Upon receipt of the form 150, I in timely fashion on September 25, 1967 filed an application for conscientious objector status, making reference therein to particular persons who could attest to my sincerity and principled position. In addition, I appended extensive and detailed riders in response to each of the questions on the form. Both the application and the riders are annexed hereto as Exhibit B.

5. In essence, my beliefs, as expressed in the application and held to this day are that:

(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basic spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change; and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it has presented me with a new training ground for the practice of my beliefs.

(d) Generally, I indicated that there was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war.

6. Thereafter in late September, the Assistant Clerk of Local Board No. 7 wrote a series of letters to the references which I had enumerated in my 150 application form. In the period October 3rd through January 4th the referents responded, Each of the references are appended hereto as Exhibit C. Even a cursory reading of them reflects the view that my beliefs are sincere and deeply held and that each of the sources which I chronicled as the basis for my conviction were in fact known to one or more of the referents.

7. Thereafter, in mid-October, I was asked to attend a meeting of the Local Board to assist it in determining my correct classification (Exhibit D)

8. On November 15, I appeared at a meeting before my Local Board. At that meeting, the following points of significance were raised with regard to my conscientious objector status:

(a) The Board was interested in my awareness of the consequences of obtaining I-O status and the requirement that I perform alternative civilian service. I indicated my unequivocal willingness to perform alternative civilian service, particularly in the areas of concentrated poverty in our country. I suggested that I had a deep feeling of obligation to serve my country but that my conscience would not permit me to do so in the military establishment.

(b) The Board inquired as to those aspects of religious training in the Lutheran church which might reflect support for my religious opposition to war in any form. I indicated that, although I at that time knew of no doctrinal Lutheran church statement expressing opposition to war, it was a matter of a general statement of faith.

(c) The Board read to me a list of institutions it felt would be appropriate locations for alternative service. I indicated I would be willing to serve in any of the locations listed, however expressing the fact that I hoped the Board would give me some choice so that a suitable position for my wife, who is also a physician, might be arranged.

(d) Finally, I informed the Board that I had brought a witness with me, as I understood I could, to attest to my

sincerity. This witness, Dr. David Wegman, Senior Assistant Surgeon in the United States Public Health Service, was not permitted to attend the hearing.

Following the interview with the Local Board I prepared a summary of the contents of the meeting which I forwarded to the Board and which appears annexed hereto as Exhibit E.

The Board in its summary of Appearance indicated that:

> "Registrant stated that his religious belief is the way he lives. This was brought on by the way he lived and was brought up. He stated that he does not want to serve in any capacity in the Armed Forces. He feels that by serving as a doctor in any of the branches, he would have to heal the wounded in order to send them back into battle, and perhaps get killed. He stated that he would be happy to do his share by serving his time in any hospital or mental institutions in slum areas and under-privileged children and people. Mr. Bennett, a Board Member, read from the Act the part concerning a C.O.
>
> "The Board then advised the registrant that they would re-open his 2-A classification so that he would have the opportunity of appealing this classification, as they did not feel that he should be classified as a C.O. at this time."

That summary is annexed hereto as Exhibit F.

9. On November 15, 1967 I was notified that I was retained in my II-A deferred classification and would not be given conscientious objector status at that time.

10. On February 14, 1968, the Local Board, apparently by a vote of 5 to 0, classified me as I-A and mailed that notice

of classification (Form 110) to me. Within 30 days from the date of notice, I requested a personal appearance before the Local Board.

11. On May 2, 1968, the Board again requested that I attend a subsequent meeting to assist it in determining my correct classification (Exhibit G) and suggested that I appear at its offices on May 22, 1968 at 8:00 P.M.

12. In anticipation of the personal appearance, and to satisfy myself as to the Lutheran church's position with regard to participation in war, I made inquiry of Pastor Ray L. Miklethun, a Lutheran clergyman of my acquaintance. Pastor Miklethun by letter dated April 16, 1968 (received by the Board on May 22, 1968) indicated to the Board that "while Lutheranism has not held a total pacifistic position on war, it has always recognized and supported men who have held this belief." The letter indicated that within the Lutheran church a fellowship of clergymen and laymen who are conscientious objectors has developed. Finally, the letter indicated that: "Men who have come out of Lutheran training have been taught that there are limits on participation in war for every Christian . . . [and that the following] statement from *The Augsberg Confession*, Article XVI is typical.

> 'Our churches teach that lawful civil ordinances are good works of God and that it is right for Christians to engage in just wars . . . 'But when commands of the civil authority cannot be obeyed without sin, we must obey God rather than man.' "

This letter of Pastor Miklethun was reviewed by the Board at my appearance before it. It is appended hereto as Exhibit H.

13. Pursuant to suggestion of the Local Board and in anticipation of the May 22nd meeting, I filed a statement which

is annexed hereto as Exhibit I. That statement was an attempt to review and clarify the several points referred to in Paragraph 8, *supra*, and which were raised at the meeting of the Board November 15, 1967.

In pertinent part, I indicated that although I was not a Quaker in the traditional sense, I had gone to a Quaker University and had been influenced by the Quaker philosophy and tradition. I indicated my understanding that formal membership in a "peace church" was not a requisite for consideration of status as a conscientious objector.

In addition, I referred to the lack of awareness on the part of the Local Board of any Lutherans who took a conscientious objector position and indicated that I had in the intervening months become familiar with a group called the Lutheran Peace Fellowship, an organization of Lutherans who hold conscientious objector status.

Finally, I indicated that, although I was not presently a formal member of the Lutheran Church, my beliefs, while certainly constituting a personal moral code, were clearly not merely that since my beliefs are ideals which emanate from centuries of religious tradition with which I have grown from childhood to today.

14. At the meeting before the Local Board on May 22, 1968, the Local Board classified me as a conscientious objector and forwarded my I-O notice of classification.

The Board, subsequent to that meeting, in its Summary of Appearance, stated:

> "Registrant read the attached statement in its entirety. When he finished the board asked if he believes in a Supreme Being, he answered yes. The board asked again

> if he would be willing to work in an institution as a Conscientious Objector status [sic]. He replied he would."

Copy of Summary of Appearance is annexed hereto as Exhibit J.

15. On or about May 24, 1968, I received the notice of classification form with the designation I-O reflecting conscientious objector status.

16. Thereafter on June 4, 1968, Col. John W. Brokaw, Operations Officer and Deputy State Director of the New York Selective Service System forwarded two letters, one to the Appeal Board, Southern District of New York (annexed hereto as Exhibit K) and the other to Dr. Samuel Tunick, chairman of Local Board No. 7 (annexed hereto as Exhibit L).

Each letter was to the effect that the office of the State Director wished to appeal the I-O classification given to me on May 22, 1968.

The State Director said that he thought the I-O classification should have been a I-A classification and indicated, without stating any reason whatever, that "It is our opinion that the registrant would not qualify for a I-O classification as a conscientious objector." The letter to the chairman of the Board in addition stated that the Local Board should advise the registrant and any other persons entitled to notification that an appeal was being taken by the State Director.

17. On June 5, 1968, the Executive Secretary of Local Board No. 7 notified me by letter, copy of which is annexed hereto as Exhibit M, that:

> ". . . under the provisions of Selective Service Regulations 1626.1 the State Director is taking an appeal of your present classification of I-O.

> "Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this Local Board."

This letter, as all other communications between myself, the Local Board and the two Appeal Boards, contained no suggestion whatever either as to the reasons for taking of an appeal by the State Director or as to the standards to be applied to judge the finding of the Local Board.

18. On June 9, 1968, Mrs. Carol McEldowney, one of the persons who had filed a letter in support of my request for conscientious objector status, wrote to the Southern District Appeal Board expressing her shock and upset to find the State Director was appealing my classification, indicating that she saw no reason for challenging the classification and suggesting that she would appreciate information with regard to the reasons for the appeal (Exhibit N).

19. The next day I wrote to the Southern District Appeal Board (copy of which letter is annexed hereto as Exhibit O) initially stating my surpirse and dismay at the action of the State Director in appealing my classification and suggesting much bewilderment as to the reason for questioning the I-O classification. My confusion was so great that I said to the District Appeal Board "I request a statement indicating the basis for the State Director's appeal. I also request an opportunity to reply to such a statement, before the Southern District Appeal Board makes a decision concerning my classification."

20. The Southern District Appeal Board did not answer either of my requests and no suggestion has ever been made as to the basis of the State Director's appeal nor was an oppor-

tunity given me to reply before the Appeal Board made its decision.

21. On June 17, 1968, Dr. Frederick C. Robbins, Dean of the School of Medicine, Western Reserve University, another of the persons who had written to the Local Board in support of my conscientious objector application, wrote to the Southern District Appeal Board suggesting in the "strongest terms" his view that the action of the Local Board in classifying me as a conscientious objector was consistent with his own view both of the statute and of myself. (Exhibit P)

In addition, Dr. Robbins wrote to the Executive Secretary of Local Board No. 7 suggesting that he was "quite taken aback" by the fact that the State Director had chosen to appeal. (Exhibit Q)

22. On June 20, 1968, the Appeal Board for the Southern District apparently met, although there is no suggestion in my Selective Service file that there was a meeting, formal or informal.

The action of the Appeal Board, reflected in the Individual Appeal Record, merely states that it voted 4 to 0 that I should be classified in Classification I-A (Exhibit R)

23. On June 24, the Rev. Donald C. Armstrong, another of the persons who had written a letter of reference on my behalf to the Local Board, wrote to the Southern District Appeal Board and reiterated the fact that my conscientious objection was well grounded in both the religious and patriotic traditions of our country. The letter indicated in pertinent part that:

> "The State Director of Selective Service's decision to deny Dr. Fein this status thus appears to be questionable on the basis of the knowledge that is available

about Dr. Fein, but even more on the basis of seeming to refuse to recognize an appeal based on highest conscience."

(Exhibit S)

24. On July 13, 1968, I wrote to General Lewis Hershey, the Director of the Selective Service System, summarizing my position with regard to conscientious objector status and describing at some length the events which transpired between myself and the Selective Service System.

I indicated among other things that a number of injustices occurred with regard to my case, including:

"1. The autonomous opinion of the local board has been contradicted by the opinion of the appeal board, in the circumstance in which the opinion of the local board was challenged by the State Director rather than myself.

2. The State Director, to this time, has not stated to me, the basis for his challenging the local board's judgment, with regard to my case.

3. The local board did not give me an opportunity to submit additional information to my file before forwarding it to the appeal board.

4. I was given no opportunity to present rebuttal to the State Director's reasons for challenging my classification of I-O, whatever they may be.

5. I was granted no right to personal appearance before the appeal board.

I indicated that while I understood that the regulations did not make provision to the Presidential Appeal Board as a matter

of right I hoped that General Hershey could take such an appeal on my behalf if he thought that it was in the national interest or necessary to avoid an injustice. (Exhibit T)

25. On July 31, 1968, I received a Notice to Report for Induction on September 6, 1968, pursuant to "Special Call No. 42, Doctor of Medicine", a copy of which is appended hereto as Exhibit U. Thereafter, on August 29, 1968, that order to report for induction was postponed. (Exhibit V)

26. In mid-July, I received a letter from General Hershey which indicated that his office would consider my case.

27. During the months of July and August, 1968 and at approximately the same time that I had been ordered to report for induction, I received a series of communications with regard to a potential appointment as a commissioned officer in the Armed Forces. On August 20, 1968, I wrote to Lt. Col. Holland W. Starkey, Department of the Army, indicating that I would be unable to accept a commission and assigning as the primary reasons for such rejection that I was a conscientious objector and opposed to military service. A copy of that letter is appended hereto as Exhibit X.

28. On September 16, 1968, Col. G. J. Wendel, Special Assistant to the Director, National Selective Service Headquarters, wrote to Local Board No. 7 (Exhibit Y) and to the State Director of Selective Service (Exhibit Z), noticing the appeal to the National Selective Service Appeal Board in the name of the Director..

29. On September 20, 1968, a representative of the office of the State Director wrote to the chairman of Local Board No. 7 indicating that the National Selective Service Headquarters had advised him that an appeal was being taken to the National Selective Service Appeal Board on my behalf and suggested

that, pending determination, my order to report for induction should be cancelled. A copy of that letter is appended hereto as Exhibit AA.

30. On September 23, 1968, pursuant to both regulation and specific request of the State Headquarters, I was advised by my Local Board that the order to report for induction had been cancelled and that the Local Board had been advised that the National Selective Service Director was taking an appeal to the National Appeal Board. (Exhibit BB)

31. On October 1, 1968, I, for the second time, wrote to the New York State Director asking for some statement which would reflect the basis for challenging my I-O classification and appealing to the Southern District Appeal Board. I stated in that letter: "I could not then, nor can I now, imagine on what grounds you questioned my classification of I-O." In the same letter I once again reiterated that "I would like the opportunity to submit any new information to the National Selective Service Board, which might arise in answering a statement of your reasons for raising my classification of I-O to the Southern District Appeal Board." I never received any response to this letter nor in fact to any other communication which I addressed to the Appeal Board other than the notice of their action. (Exhibit CC)

32. On October 28, 1968, I wrote to the New York State Selective Service Director (Exhibit DD) suggesting that there had been no answer to my letter of October 7th and reiterating my request that I be given a statement from the New York State Director concerning the basis of his appeal from the Local Board's classification of I-O. The response from the State Director's office, dated October 31, 1968, acknowledging only my letter of October 28th, merely stated:

"... that it was the opinion of the State Director of Selective Service that you did not qualify for a deferment in Class I-O as a conscientious objector.

"The State Director's decision was based upon the information contained in your selective service file."

That letter was silent with regard to any matter of substance concerning the bona fides of my status. Even a cursory examination of the letter reveals there does not appear to be reference to either my sincerity or the nature of my religious training or beliefs or my opposition to participation in war in any form. Since these are the only criteria which I understand are relevant to a decision concerning conscientious objector classification, I was then and am to this date at a complete loss as to why there was an appeal of the Local Board's decision. (Exhibit EE)

33. On November 26, 1968, by Minutes of Action Upon Appeal to the President, the Presidential Appeal Board in Appeal No. 16,136 recorded an affirmation of my I-A classification by a vote of 3 - O. Exhibit FF). The Minutes contained no reflection of doubt either as to my sincerity or as to my principled position.

Thereafter, on December 6, 1968, the State Director notified my Local Board that the National Selective Service Appeal Board had classified me in Class I-A (Exhibit GG).

34. That has been the last communication of any relevance to my conscientious objector classification which I have received from any office of the Selective Service System.

35. If the relief sought enjoining my induction is not granted, I face immediately and severely possible loss of state

license to practice medicine and if convicted of a crime thereafter I will be unable to be licensed in any other jurisdiction.

/s/OLIVER T. FEIN

Sworn to before me this
6th day of February, 1969.

/s/Jeanette Rosenfeld
Notary Public

EXHIBIT A

[Annexed to above affidavit]

Request for Form 150

918 Lakeview Road, apt. 4
Cleveland 8, Ohio
September 12, 1967

Local Board No. 7
45 South Broadway
Yonkers, New York

Gentlemen:

Moral convictions are empty unless substantiated by moral acts. I wish, therefore, to declare myself a conscientious objector to war and the institution which propagates war, the military. I hereby request that you send me SSS form #150, so that I may explain the basis for my conscientious objection.

Thank you for your cooperation.

Sincerely yours,

/s/ Oliver Fein, M.D.
SS #30-7-40-172

Budget Bureau No. 33-R1[illegible]

SELECTIVE SERVICE SYSTEM 2-A

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

(PHYSICIAN)

Local Board No. 7

DATE QUESTIONNAIRE RETURNED

SEP 20 1967

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701

(Local Board Stamp)

Room 111, 1st Floor
of Milepkara, September 19, 1967

COMPLETE AND RETURN BEFORE 10 Days

1. Name of Registrant (First)	(Middle)	(Last)	2. Selective Service No.
OLIVER	THOMAS	FEIN	30 7 40 172

3. Mailing address (Number and street, city, county and State, and Zip Code)

918 Lakeview Road #4 Cleveland 8, Ohio

(The above items, except the date received back at local board, are to be filled in by the local board clerk before the questionnaire is mailed.)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, may for good cause shown by the registrant, grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

_____
(Signature of registrant)

B I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Oliver Fein
(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

Room 111, 1st Floor
Yonkers, N. Y. 10701

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

See extra sheets

SSS Form 150 (Revised 5-10-66). (Previous printings may be used.)

29/30 Fein Affidavit: Exhibit B

4. Explain how, when, and from whom or from what source you received the training and acquired the belief of your claim made in Series I above.

See extra sheets

5. Give the name and present address of the individual upon whom you rely most for religious guidance.

See extra sheets

6. Under what circumstances, if any, do you believe in the use of force?

See extra sheets

7. Describe the actions and behavior in your life which in your opinion most conclusively demonstrate the consistency and depth of your religious convictions.

See extra sheets

8. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

See extra sheets

Series III—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended From—	Dates Attended To—
Yonkers High School	public h.s.	Yonkers, New York	19 55	19 58
Swarthmore College	college	Swarthmore, Pennsyl.	19 58	19 62
Columbia University	university	New York, New York	19 62	19 65
Western Reserve Univ.	medical sch.	Cleveland, Ohio	19 65	19

2. Typical list of all occupations, positions, jobs, or types of work, other than as a student in school or college, which you have been engaged, whether for monetary compensation or not, giving the facts indicated below for each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked From—	Period Worked To—
Intern	Cleveland Metro. Ho.	Brunch Rock, Cleveland, Ohio	19 62	19
			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

Number City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence	
			From—	To—
Cleveland	Ohio	11114 Berkshire Ave.	19 65	19 66
Cleveland	Ohio	2908 Jay Avenue	19 6[illegible]	19 [illegible]
Cleveland	Ohio	1651 E. 93rd	19 6[illegible]	19 [illegible]
Cleveland	Ohio	10108 Carnation Ave.	19 [illegible]	19 [illegible]
New York	New York	200 Riverside Drive	19 60	19 [illegible]
[illegible]	Pennsylvania	[illegible]	19 [illegible]	19 [illegible]
Yonkers	New York	29 Rockland Avenue	1944	1963

4. Give the name and address of your parents, and indicate whether they are living or not.

[illegible] and Beatrice Fein - both living

[illegible] High Street, Hastings-on-Hudson, New York

5. (a) State the religious denomination or sect of your father Lutheran-Congregational

(b) State the religious denomination or sect of your mother Lutheran-Congregational

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

NO

2. Are you a member of a religious sect or organization? ☐ Yes ☒ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

See answer to Series II, question 6.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give the names and other information indicated concerning persons who could supply information as to the sincerity of the professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship
Mrs. Alice Aarons	976 Lakeview, Cleve., O.	mother	friend
Mrs. Harold Armstrong	1776 W. 58th St., Cleve.	minister	friend
Mrs. Ida Holubert	2501 Dentzler, Cleve.	doctor	therapist
Carol Mahoney	11116 Grocery, Cleve.	organizer	friend

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the form and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Oliver Thomas Fein, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are (are, are not) in my own handwriting.

Registrant sign here Oliver Fein
(Signature or mark of registrant)

September 25, 1967
(Date)

(Signature of witness to mark of registrant)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(Use example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

U.S. GOVERNMENT PRINTING OFFICE: 1950—O-930-930

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Series II: Question 2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

The beliefs, from which spring the basis for my conscientious objection, include:

1. human beings are primarily "good".
2. the expression of this "goodness" can only be realized, if human beings are allowed to fulfill their potential.
3. all human beings are fundamentally equal, in terms of their value as human beings.

These three beliefs are statements of an ideal. This ideal suggests that a quality or being exists in all men, which is inviolable. The existence of this quality among men imposes upon me responsibilities which surpass any single human relationship. These responsibilities include working for a society that allows for the expression of man's goodness and reflects the individual equal value of each human personality. The style of life dictated by my ideals involves non-violent relationships and some framework of social equality.

War violates this essential being in all men and would compel me to abandon my responsibilities. Rather than secure for man the society in which beliefs such as mine can flourish, it fosters irresponsibility for inhuman and cruel acts. War demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

In today's world, where there is a growing abandonment of any devine or human code, there is a necessity to reaffirm the values underlying my beliefs. In a world, confronted with the possibility of its own self-destruction, human values and justice must be kindled. Otherwise, the world must face the fate of domination by animal instincts, cunning and violence. Thus the quest for my beliefs takes on profound significance in the context of the present world. For my world view anticipates only the destruction of justice and all human relationships, unless men adhere to the value of man.

In what manner, are the preceding ideals, statements of religious belief? Religion can be defined by function. That is the religion sets forth a guideline for human conduct which determines how human beings should relate to each other. In many religions, these functional qualities are derived from a particular cosmology or theology. Though theology is important in distinguishing the credal diferences between religions, it does not lead to widely differing guidelines for human behavior. It is in the codes for human relations that all religions find their common ground. The substance of my beliefs stems from this common foundation of all religions. Thus my beliefs are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition.

Series II: Question 3. Explain how, when, and from whom or from what sources you received the training and acquired the belief which is the basis of your claim made in Series I above:

Four primary sources have shaped my beliefs and molded my training: my parents, my church, the civil rights movement and medicine.

My parents: From my parents, I gained a basic approach to life, which placed spiritual values above material values. Their

emphasis on creativity, singing, painting and poetry, served as a cornerstone to my belief in the "goodness" of mankind. Though my parents do adhere to a particular set of religious principles, they have been sufficiently permissive to embody the operating model of a group of people, the family, established to allow each individual to fulfill his potential. Thus to each of their sons, they imparted both material, and more importantly, spiritual resources, when these were requisite for fulfilling goals, not always of their liking. Although discussions of war and non-violence were not the predominant content of my relationship with my parents, my mother in particular, probably cemented inclinations towards these issues. Recently in communicating with my parents concerning my position as a conscientious objector, my mother wrote, "I guess I have been basically a pacifist all my life, without ever knowing it."

The Church: From the church, I grasped the concept of the equality of man before God, and the singular value of each individual human being to God. These concepts were fundamental to the doctrine and evangelical character of the Lutheran Church. I recall rejoicing in the truth of the parable, in which it was easier for a camel to pass through the eye of a needle, than for a rich man to enter the kindom of heaven. But the church, also conveyed these attitudes in the relationships it permitted me to establish. Thus, I was able to develop respect for a wide variety of peoples, many of whom differred from my parents in social class and culture. A carpenter, a laborer, a mechanic—each I emulated and regarded as an equal. Of course, the church also reinforced values based on non-violence derived from my parents, as in the beatitudes: "Blessed are the peacemakers: for they shall be called the children of God." But the primary contribution of the church to my development, was the inculcation of the ideal of man's unique worth and equality.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

The civil rights movement: It was not until my involvement with the civil rights movement, that the values of my youth began to take shape and find public expression. The non-violent tactics and way of life originating from the southern Negro students, seemed to be based on my ideals. This form of social change won my allegiance and participation. In Chester, Pennsylvania; in Washington, D.C.; and in Cleveland, Ohio, I received my practical training in the application of my ideals to the society.

Medicine: Medicine represented an extension of that practical training started in the civil rights movement. In medicine, I found a vocational way of expressing my values. For medicine represented the epitome of a vocation that placed a value on human life itself. It preferred not to judge the individual on economic status. Life of all people regardless of social standing deserved equal protection. The preservation of man, not his destruction, was a primary concern. Medicine also represented a new training ground for practicing my beliefs. I learned anew, the equality of man, this time when confronted with death. I was taught again, the unique value of each individual life. I became equipped to preserve and maintain life in the most elementary sense.

Thus, with moral foundation laid by my parents and church, and with a practical training in moral expression through the civil rights movement and medicine, the source for the values and beliefs which lead to my conscientious objection is explicit.

Series II: Question 4. Give the name and present address of the individual upon whom you rely most for religious guidance.

There is no single person, on whom I presently rely for the preponderance of my religious guidance. However, many people

have been significant in contributing to my religious training. In a primary way, as I have mentioned before, my parents have important sources of religious guidance. Over the years, many people have joined their ranks. Among these are the Rev. Robert Heffner (now chaplin, Hartwick College, Oneonta, New York), Dr. Joseph Conard, professor of economics, Swarthmore College, Swarthmore, Pennsylvania (deceased), the Rev. Bruce Klunder, of the student Christian Movement, Cleveland, Ohio (deceased).

Series II: Question 5. Under what circumstances, if any, do you believe in the use of force?

Force is a dynamic term. While it connotes power, energy, coercion and restraint, by itself, the term force does not define the character of these processes. The actual means used to coerce or restrain give substance to the word. Thus, there can be moral and ethical force, as well as violent force. The power of moral force stems from the fundamental "goodness" in human beings. This aspect of men is drawn out and reinforced by the application of moral and ethical force. On the other hand, the use of violent force often evokes the reciprocal violent response from those against whom it is applied. Thus, I believe in the power and values of moral and ethical force, while I reject violent force.

This rejection of violence, however, may be modified by circumstances and the individuals involved. If violently attacked, I might respond violently in self defense, although my motivation would be merely to disarm my opponent and not to kill him. Likewise, my response to the violent assault of a loved one, might well lead me to resort to violent defense. But these illustrations are limited to particular circumstances and specific relationships. They do not hold when generalized to nation

states and war. This is true, because war involves wholesale destruction, not disarming, of the enemy, in a situation where individual relationships between combatants are non-existent. Whole groups of people may be killed without choice, often completely innocent and uninvolved. Finally, the potential of nations to destroy entire nations and the world, makes generalization from individual circumstances to nation states impossible.

Series II: Question 6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

My parents were and are concerned Christians. As a child, I participated in church activities, largely because of the sincere involvement of my parents. During my early adolescence, whatever else I rejected of my parents, the church was not among them. In Boy Scouts, rather than attain high rank, I sought the Lutheran Church Scouting award, Patrio et Deo. Subsequently, I stepped out to become active in the youth activities of the church. Throughout high school, I worked to develop the Luther League program of my local church, the county of Westchester and the state of New York. Even after the first year of college, I travelled as a "caravaner" in the South for the Luther League of America. Through all these experiences, I came in contact with new ideas: the problem of segregation and the issues of war and peace. But by the time I turned 18, none of these questions had become clear enough for me to articulate a set of ideals.

It was while attending the Quaker College of Swarthmore, that I began to formulate my values, although initially I tended to act rather than meditate. The trip to the South after freshman year, alerted my mind to the extent that segregation

permeated American society. The injustice that segregation represented thoroughly disgusted me, and I broke with the church that had given me sustinence until that time, because it condoned segregation in its Southern churches. During my second year at Swarthmore, I cast about seeking ways for expressing my newly developed concept of justice. After returning from a summer in Germany, I was incensed with the biased American journalism about Cuba, which contradicted what I had read in England and Germany. In search of the truth about Cuba, I helped organize an independent trip to that country, by a small group of Swarthmore students. In the fall of my third year at Swarthmore, I attended the second meeting of the founders of the Student Non-violent Coordinating Committee (SNCC) in Atlanta, Georgia. There I was exposed to the concept of non-violent force for change. As chairman of SPAC, the Swarthmore Political Action Committee, I helped organize demonstrations against Woolworth in Chester, Pennsylvania. Later, it was my initiative that established bonds between Swarthmore students and the Chester NAACP. These experiences were most formative in developing my ideas about non-violence. After my third year at Swarthmore, I worked with the American Friends' Service Committee project in the slums of San Francisco. This introduction into the ghetto, primarily through youth gangs, began the pathway which I later trod in Cleveland.

When I was graduated from Swarthmore, I went to Columbia University in New York City, to pursue graduate and pre-medical studies. There I was asked to supervise a high school student group concerned with peace, named STOP. Our concern was primarily for a nuclear test ban treaty and the elimination of the bomb shelter hoax. Though I worked on peace issues, my commitment to non-violence had not yet matured.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Only in Cleveland, after attending the March on Washington, did I make a full commitment to non-violence. I settled in the midst of the Negro ghetto, during my first year of medical school. There, I hoped to learn better the problems that my Negro neighbors faced in American society. Segregation within the Cleveland school system was a manifest problem. Because of inadequate school facilities, Negroes were being bussed from their neighborhoods to Caucasian schools. However, in these Caucasian schools, they were denied equal access to major facilities, such as bathrooms, playgrounds and assemblies, in an apparent attempt to maintain segregation within the schools. When a group of parents decided, after months of petitioning, to "sit-in" at the Board of Education, I was there with them. For the first time, I realized the power of non-violent action, and its consequences. I was arrested that day for obstructing a fire exit, that is, for non-violent expression of a need for change in the Cleveland school system.

When Students for a Democratic Society contacted me about the possibility of establishing a community project in Cleveland, I seized the opportunity to find a style of life, which would fulfill my new non-violent commitment and provide a framework for working out my ideals about justice and equality. Still today, I live cooperatively, sharing my livlihood with others, all of us helping to allow the maximum expression of each other's potential. Cooperative living has been only one aspect of the community organizing program started in Cleveland by SDS. The neighborhood work itself fostered a fierce anger towards injustice and a respect for the equal worth of men. At first, we worked in a poor white community on issues of unemployment housing and welfare. We achieved small gains, such as the instituting of a free school lunch program for welfare children. However, our activities could not be confined

to the white west-side community alone. After one year, the black community was demanding help to develop indigenous groups there. My wife and I responded by returning to the Negro community, where we have lived since.

Through our involvement in community work, we were made painfully aware of the health deficiencies which crippled the poor community. Clinics were too far away; waiting lines were too long and tedious; doctors were never the same. At the end of our first year in medical school, we decided to study the problem of health care in the inner-city. Data abounded which convinced us of the severe health needs of the inner-city. With the supposed availability of facilities, such as university-centered medical clinics, we asked why people didn't use them. Though a complete answer was not established by our study, it did demonstrate that the primary variables inhibiting medical care utilization by the inner-city are dignity factors, such as waiting, and interpersonal factors, such as the lack of continuity of care and communication with the doctor.

My commitment to cooperative living and the poor community stands as a mature expression of my beliefs. From my choice of vocation to my style of life, I have tried to remain responsible to my beliefs. Thus, I have sought to turn non-violent levers for change in my society, where I have seen injustice; and I have sought to provide, where possible, the opportunity for self-fulfillment of those around me.

Series II: Question 7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for you claim made in Series I above? If so, specify where and when.

Written speech: "The need for a nuclear test ban treaty", given before a meeting of high school students, sponsored by STOP in Brooklyn, New York, 1963.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit B—Continued)

Closing remarks, not written, to the Student Health Organizations Conference, at Albert Einstein School of Medicine, New York, New York. February, 1967.

Thesis in partial fulfillment of the requirement for the degree of doctor of medicine: "Attitudes toward Medical Care in the inner-city", completed in January, 1967. Presently located in the library of the Western Reserve School of Medicine, Cleveland, Ohio.

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT C

[Annexed to above affidavit]

Letters of Reference

976 Lakeview
Cleveland, Ohio
Sept. 30, 1967

Selective Service
Local Board #7
Yonkers, N.Y.

Dear Sirs:

In reply to your request for information about.

DR. OLIVER T. FEIN

I give the following information which is without bias and, I believe, the honest truth.

Dr. Fein is most sincerely objective to cruelty of any kind. He is known in our neighborhood as a "most gentle" guy.

To expose Dr. Fein to the kind of brutality evident in war would, I believe, change his personality for the worse instead of better. I feel that the gentleness, patience and compassion that is so rarely seen in young people of this generation, would be utterly destroyed.

While we know there is a war and some must fight we must also realize that some are not capable of doing their best under the conditions of war. I feel for services that he is best qualified to do Dr. Fein would better serve mankind here at home than abroad.

Most sincerely yours,

Alice Aarons

Affidavit of Oliver T. Fein in Suport of Motion
(Exhibit C—Continued)

WEST SIDE CITIZENS ACTION ASSOCIATION

1776 West 38th Street
Cleveland, Ohio 44113

October 5, 1967

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, New York 10701

Gentlemen:

I am replying to your inquiry about the sincerity of Dr. Oliver T. Fein's professed convictions against participation in war, as it relates to his status as a conscientious objector.

I have know Dr. Fein for more than three years during his time in medical school and now, as he interns at Metropolitan General Hospital in Cleveland. He is a dedicated humanitarian who is seeking to serve his fellow men through the medical processes of healing and preventive medicine. With this commitment to healing people, I have heard him express many times that war is directly contrary to what he is seeking to do with his life for other men, that war aggravates human problems and misery and is therefore morally wrong.

I have full confidence in the sincerity of Dr. Fein's convictions in these matters.

Hoping that this may be of help to you in your deliberations, I am

Very truly yours,

/s/(Rev.) Donald C. Armstrong

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

11116 Greenview
Cleveland, Ohio 44108
19 December 1967

Local Board No. 7
45 South Broadway
Room 111 1st Floor
Yonkers, New York 10701

Dear Sir:

May I first apologize for the tardy response to your letter of September 27, 1967, regarding Dr. Oliver T. Fein, SS No. 30-7-40-172. I was away from home several months, and the letter finally reached me very recently, and I hope my response can be of use to you at this late date.

I am very pleased to be able to recommend Dr. Fein for conscientious objector status. I have known Dr. Fein for a number of years, and during that time I have had the pleasure of working rather closely with him, so I can describe his beliefs with some confidence.

Dr. Fein has a tremendous respect for people and for the value of human life, a belief which has encouraged him to enter the field of medicine. And this attitude also, I believe, helps explain his very consistent position against war and his own unwillingness to participate in war, a view he has held for as long as I have know him (over 4 years). I have frequently heard him explain his views about war to others, and I know he has been willing to make public statements about his beliefs. I know also, from contact with him and his associates, many activities he has had (especially while in college), putting into practice his belief that participation in war is wrong.

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

Finally, at times I have lived in the same neighborhood as Dr. Fein, and have had contact with neighbors of his. Some of these neighbors whom he knows well have told me of their great respect for Dr. Fein, both because of his devotion to his work, and because of the strength of his convictions against participation in war.

If I can supply you with any further information, please feel free to inquire. Thank you.

Sincerely,

/s/(Mrs.) Carol McEldowney

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit C—Continued)

CASE WESTERN RESERVE UNIVERSITY
CLEVELAND, OHIO 44106

January 2, 1968

Selective Service System
Local Board No. 7
45 South Broadway
Yonkers, New York

Dear Sirs:

This is in regard to Dr. Oliver Fein (Selective Service #30-7-40-172), who has declared himself to be a conscientious objector. I am well aware of the difficulty that you must have in dealing with such a situation, particularly when the person in question has only a tenuous relationship with any formal group generally recognized as opposing war on religious or moral grounds. Thus, I should imagine that the matter of the sincerity of Dr. Fein would be something about which you would be very concerned. It is to this point that I should like to address myself.

I have known Dr. Fein and his wife throughout their career in medical school and have had many contacts with them. They were both excellent students and are now performing in a superior manner as internes. They are intelligent and capable physicians but they are most notable because of their deep and compassionate concern for people and their adherence to the highest of ideals. They are both modest, humble people who do not intrude their ideas on others. They have chosen to express their idealism through their performance in life rather than in words. For instance, they chose to live in one of the more deprived neighborhoods in Cleveland and worked quietly but tirelessly to improve the lot of the residents of the area. This

they did in spite of the heavy demands of a medical school curriculum, without compromising their performance as students.

It should be clear that I have the highest regard for these young people. One may disagree with the specific ideas that Dr. Fein expresses, but in my opinion, his honesty and sincerity is not be be doubted.

I hope that my comments may be of some assistance to you in considering this matter and that you will find it possible to render a favorable decision in regard to Dr. Fein.

Sincerely yours,

/s/Frederick C. Robbins, M.D.
Dean, School of Medicine

FCR:rab

School of Medicine
2107 Adelbert Road

EXHIBIT E

[Annexed to above affidavit]

Summary of Personal Appearance by Fein

SUMMARY OF LOCAL BOARD NO. 7 MEETING WITH OLIVER FEIN (30-7-40-172) on NOVEMBER 15, 1967

On November 15, 1967, at the local board's request, I attended a meeting in which the following points of significance were raised.

1. The local board asked if I was aware of the consequences of obtaining the Conscientious Objector status, i.e., civilian alternative service. I indicated my willingness to do civilian service, particularly in the areas of concentrated poverty in our country. I indicated that I felt an obligation to serve my country, but that my conscience would not permit me to do so in the military.

2. The local board read section 6(j) of the Selective Service Law several times. Then the local board proceeded to ask on what basis I claimed to be a conscientious objector. I replied, "On the basis of my religious training in the Lutheran Church and the beliefs that I have come to hold emanating from that training in my conscience." Then the board asked, if the Lutheran Church is opposed in its doctrine to war? I replied, "not in any specific way, however in the general statements of the faith it was." The local board proceeded to say that, in general, everyone including itself, is opposed to war, and that the local board had never met a Lutheran before who claimed to be a conscientious objector. Then, the local board noted that I had attended a college with a Quaker tradition, and asked if I was a member of the Society of Friends. I replied, "I am not presently a Quaker."

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit E—Continued)

3. The local board proceeded to read out a list of institutions that they felt would be appropriate locations for alternative service. I indicated that I would be willing to serve in any of the locations listed, however, I hoped that the board would allow me some choice, so that a suitable position for my wife might be arranged, since she also is a physician. The local board then, gave me the book containing all possibilities for alternative service and admonished me to make a list of those places which I thought might be suitable locations for alternative service, so that I could discuss them with my wife and present them to the board. I was then dismissed from their presence.

4. Upon entering and before leaving, I informed the local board that I brought a witness with me, who could testify as to my sincerity. This witness was Dr. David Wegman, a senior assistant surgeon in the United States Public Health Service. On both occassions the board said they did not wish to see my witness and refused to allow him to attend the hearing.

5. Three minutes after dismissing me from the room, the local board announced that they did not feel they could grant me conscientious objector status at that time.

/s/Oliver Fein, M.D.

I have read the above statements concerning the events of the November 15, 1967 hearing before local board #7 of Oliver Fein, and agree that these were the points mentioned to me after the hearing by Oliver Fein.

/s/David Wegman, M.D.

NEW YORK STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Approved by Director
of Selective Service

SUMMARY OF APPEARANCE BEFORE LOCAL BOARD

Name of Registrant: FEIN, Oliver Thomas Date of Appearance: 11/15/67
Selective Service No. 30-7-40-172
Local Board Member or Members present at meeting: Start of Hearing 9:00 P. M.
Dr. Dunick;Mr. Bennett; Mr. Walker; Mr. Minervini End of Hearing
The registrant has an outstanding order to report for induction. ( ) Yes (x) No

I-O

Type of Appearance:

( ) Procedural right under section 1624.[illegible] Selective Service Regulations.
(x) Discretionary interview.
( ) Meeting under section 1660.20(c) of Selective Service Regulations.

Present classification 2-A Desired classification 1-O

Other persons appearing: None

Oath (affirmation) taken by: Mr. Minervini

Action taken by local board:

( ) The registrant's classification was not reopened.
( ) Postponed registrant's induction until
( ) Request permission from State Director to reopen registrant's classification.
( ) Classified registrant in Class .
( ) Type of civilian work appropriate for registrant to perform in lieu of induction into armed forces

Complete the following if applicable. If either of the following is checked, the opinion of the local board should be recorded on the Minutes of Local Board Meeting (SSS Form 112).

(x) It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction.

( ) It is the opinion of the local board that the registrant's beliefs matured after the issuance of his order to report for induction. (If such is the case, the local board is required to reopen the registrant's classification.)

Appeal Board-Southern Dist.
46 South Broadway
[illegible] 1968
Room 111, 1st Floor
[illegible], N. Y. 10701

N Y FORM 7 (Sheet 1) (Rev. 4.20.67)

Oral information given by registrant or other persons appearing (indicate which) to assist the local board in classification. (If no additional information is submitted, so indicate.)

Registrant stated that his religious belief is the way he lives. This was brought on by the way he lived and was brought up. He stated that does not want to serve in any capacity in the Armed Forces. He feels that by serving as a doctor in any of the branches, he would have to heal the wounded in order to send them back into battle, and perhaps get killed. He stated that he would be happy to do his share by serving his time in any hospital or mental institutions in slum areas and under-priviledged children and people. Mr. Bennett a Board Member, read from the Act the part concerning a C. O.

The Board then advised the registrant that they would reopen his 2-A classification so that he would have the opportunity of appealing this classification, as they did not feel that he should be classified as a C. O. at this time.

(Attach additional sheets if required)

Written information given by registrant or by other person appearing (indicate which) to assist the local board in classification:

Exhibit A

Exhibit B

Exhibit C

Above summary prepared by Evelyn L Foley Clerk
(Name) (Title)

Date: 11/15/67 19___

N Y FORM 7 (Sheet 2) (Rev. 4.20.67)

Local Board-Southern Dist.
45 South Broadway
Room 111, 1st Floor
Yonkers, N. Y. 10701

57/58
Fein Affidavit: Exhibit F

Plaintiff's

NEW YORK STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Approved by Director
of Selective Service

SUMMARY OF APPEARANCE BEFORE LOCAL BOARD

Name of Registrant OLIVER THOMAS FEIN Date of Appearance: 9/27/68

Selective Service No. 30-7-40-172

Local Board Member or Members present at meeting: Start of Hearing 9:30 P. M.

Dr. Tunick; Mr. Casey; Mr. Minervini; Mr. Walker End of Hearing 10:00 P. M.

The registrant has an outstanding order to report for induction ( ) Yes ( ) No

Type of Appearance:

(XX) Procedural right under section 1624.1 of Selective Service Regulations.
( ) Discretionary interview.
( ) Meeting under section 1660.20(c) of Selective Service Regulations.

Present classification 1-A Desired classification 1-O

Other persons appearing: None

Oath (affirmation) taken by: Mr. Paul Casey

Action taken by local board:

( ) The registrant's classification was not reopened.
( ) Postponed registrant's induction until _____
( ) Request permission from State Director to reopen registrant's classification.
(x) Classified registrant in Class 1-O.
( ) Type of civilian work appropriate for registrant to perform in lieu of induction into armed forces _____

Complete the following if applicable. If either of the following is checked, the opinion of the local board should be recorded on the Minutes of Local Board Meeting (SSS Form 112).

( ) It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction.

( ) It is the opinion of the local board that the registrant's beliefs matured after the issuance of his order to report for induction. (If such is the case, the local board is required to reopen the registrant's classification.)

Appeal Board-Southern Dist.
46 South Broadway
[illegible] 1968
Room 111, 1st Floor
[illegible]hoff's, N. Y. 10701

N Y FORM 7 (Sheet 1) (Rev. 4.20.67)

59/60 Fein Affidavit: Exhibit J

Oral information given by registrant or other persons appearing (indicate which) to assist the local board in classification. (If no additional information is submitted, so indicate.)

Registrant read the attached statement in its entirety. When he finished the bo ard asked if be believed in a Supreme Being, he answered yes. The board asked again if he would be willing to work in an institution as a Conscientious Objector status. He replied he would.

(Attach additional sheets if required)

Written information given by registrant or by other person appearing (indicate which) to assist the local board in classification:

Appeal Board-Southern Dist.
48 South Broadway

Exhibit A STATEMENT TO LOCAL BOARD #7 - DATED MAY 22, 1968

1968

Exhibit B

Room 111, 1st Floor
Nyack, N. Y. 10701

Exhibit C

Above summary prepared by _____
(Name) (Title)

Date: 5/ , 19

N Y FORM 7 (Sheet 2) (Rev. 4.20.67)

61/62
Fein Affidavit: Exhibit J

EXHIBIT K

[Annexed to above Affidavit]

Notification of Appeal by State Director

SELECTIVE SERVICE SYSTEM
NEW YORK STATE HEADQUARTERS
Federal Building, 441 Broadway
Albany 12207

Refer to file:
3-6.4-03

June 4, 1968

Appeal Board, Southern District
of New York
45 South Broadway
Yonkers, New York

Subject: FEIN, Oliver T.
SS No. 30-7-40-172

Gentlemen:

The State Director wishes to appeal the I-O classification given to the registrant by his local board on May 22, 1968, for a I-A classification.

It is our opinion that the registrant would not qualify for a I-O classification as a conscientious objector.

For the State Director

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

EXHIBIT L

[Annexed to above affidavit]

Notification of Appeal by State Director

SELECTIVE SERVICE SYSTEM
STATE HEADQUARTERS
FEDERAL BUILDING
441 BROADWAY
ALBANY, NEW YORK 12207

June 4, 1968

Dr. Samuel Tunick
Chairman, Local Board No. 7
45 So. Broadway
Yonkers, New York

Subject: FEIN OLIVER T.
SS No: 30-7-40-172

Dear Dr. Tunick:

The State Director, under the provisions of SSR 1626.1, appeals the I-O classification of the subject named.

Enclosed is the Cover Sheet (SSS Form 101) of this registrant in which has been placed Individual Appeal Record (SSS Form 120) completed and signed.

It is requested that you advise, in writing, the registrant and every person entitled to such notification that an appeal is being taken by the State Director in this case placing copies of the letters in the cover sheet.

When the above has been accomplished, please forward the cover sheet to the Southern District Appeal Board furnishing the Headquarters with a copy of your transmittal letter (LO-21).

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit L—Continued)

Kindly acknowledge receipt of the enclosed cover sheet by signing and returning the duplicate of this letter.

For the State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure

Cover sheet received on _____ by _____

7-20-67

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Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT M
[Annexed to above affidavit]

Notification of Appeal by State Director

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

June 5, 1968

RE:SS No: 30-7-40-172

Dr. Oliver T. Fein
Cleveland Metropolitan General Hospital
3395 Scranton Road
Cleveland, Ohio

Dear Sir:

Please be advised that under the provisions of Selective Service Regulations 1626.1 the State Director is taking an appeal of your present classification of I-O

Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this Local Board.

By Direction
Local Board #7

Evelyn L. Folley
Executive Secretary

cc: Dr. Frederick C. Robbins
Rev. Ray L. Miklethun
Mrs. Carol McEldowney

EXHIBIT O

[Annexed to above affidavit]

Letter of Mr. Fein

Cleveland Metropolitan General
Hospital
3395 Scanton Road
Cleveland, Ohio
June 10, 1968

Southern District Appeal Board
45 South Broadway
Yonkers, New York

Gentlemen:

I was surprised and dismayed at the action of the State Director of Selective Service, in appealing my classification of I-O, granted me by Local Board #7.

I cannot imagine on what grounds the State Director is questioning my present classification of I-O. Therefore, I request a statement indicating the basis for the State Director's appeal. I also request an opportunity to reply to such a statement, before the Southern District Appeal Board makes a decision concerning my classification.

Many thanks for your anticipated cooperation.

Sincerely yours,

Oliver Fein, M.D.

SS# 30-7-40-172

cc: Local Board #7

67/68
Fein Affidavit: Exhibit R

SELECTIVE SERVICE SYSTEM

INDIVIDUAL APPEAL RECORD

(Local Board Date Stamp)

Name of registrant FEIN (Last) OLIVER (First) THOMAS (Middle)

Selective Service Number 30 | 7 | 40 | 172

Classified by local board in Class I-O until ____, 19____

Date classified May 22, 19 68

Forwarded on appeal taken by State Director of Selective Service

Date forwarded to Appeal Board June 4, 19 68

☐ Request for Transfer of Jurisdiction Filed

Name and address of employer or residence of registrant 3395 Scranton Road

Cleveland, Ohio

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

ACTION BY APPEAL BOARD

APPEAL BOARD-SOUTHERN DIST.
45 SOUTH BROADWAY
ROOM-111, 1ST. FLOOR
YONKERS, N. Y. 10701

Appeal Board for the State of _____ (Final No. and Judicial District)

_____ (Street and number) _____ (City)

Classified in Class 1-A until ____, 19____, by the following vote:

Yes 4 No 0 JUN 20 (Date of classification by Appeal Board)

Member or Clerk of Appeal Board

INSTRUCTIONS.—The local board will prepare this form in duplicate. The original will be stapled or otherwise securely fastened to the inside of the front cover of the Cover Sheet (SSS Form 101) of each file forwarded to the Appeal Board, and the copy will be retained in the local board files in lieu of the Cover Sheet, attached to the Charge-Out Card (SSS Form 710).

When the appellant requests a transfer of jurisdiction the box indicating such request will be checked, and the name and address of the employer or the residence of the registrant entered in the space provided.

SSS FORM 120 (Revised 11-01-67)
(Previous publication may be obsolete)

EXHIBIT T

[Annexed to above affidavit]

Letter of OLiver Fein to General Hershey

11605 Fairport Avenue
Cleveland, Ohio 44108
July 13, 1968

Gen. Lewis Hershey, Director
Selective Service System
1734 F. Street, N.W.
Washington, D.C. 20434

[Local Board No. 7 stamp]

Dear General Hershey:

I am writing you to explain what I feel are grave injustices that have occurred to me in the process of the Selective Service System's dealing with my position as a Conscientious Objector.

Let me summarize my position. As I stated in my Form 150, "the beliefs, from which spring the basis for my conscientious Objection, include: (1) human beings are primarily "good"; (2) the expression of this "goodness" can only be realized, if human beings are allowed to fulfill their potential; (3) all human beings are fundamentally equal, in terms of their value as human beings." These beliefs led to my conviction that there is a quality or being common to all men, which is inviolable and supreme. This quality among men imposes upon me responsibilities which surpass those that arise out of any human relationship alone. These responsibilities, which emanate from my beliefs, have increasingly directed the activities of my life. Thus, my beliefs have led me to live in the Negro ghetto; have directed me to work with the poor; have guided me into the vocation of medicine; have placed a priority on developing non-violent relationships; and have made me unalterably

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit T—Continued)

opposed to war. I explained that the source of my religious training and belief was initially my parents and the Lutheran Church. But because of that Church's inability to deal firmly with segregation in its Southern membership, I was compelled to reject the organized church. The evolution of my beliefs was subsequently shaped by involvement in the Civil Rights Movement and the study and practice of medicine. These are the rudiments of my position as a Conscientious Objector, which are detailed more completely in my file. It is this position that will conscientiously oblige me to refuse induction into the Armed Services. It should be clear, that I am willing to serve my country, but only in activities consistent with my conscience.

Let me summarize next, the events in my case. In May, 1958, I registered with the Selective Service System. I was not a Conscientious Objector at that time. I was classified 2-S until July, 1967, when at the onset of internship my classification was changed to 2-A. In September, 1967, I submitted my Form 150. In November, 1967, I appeared before my local board, at which time questions concerning my position were raised. However, no change of classification occurred until February, 1968, when the local board classified me I-A. I requested a personal appearance, and was granted the same, in May, 1968. After the personal appearance the local board changed my classification to I-O. On June 5, 1968, I was advised that "the State Director is taking an appeal of your present classification of I-O. Your file is now being forwarded to the Southern District Appeal Board, and you will be advised of the out-come of their decision, as soon as your file is returned to this local board." On June 10, 1968, I wrote directly to the Southern District Appeal Board, with a copy to the local board, requesting "a statement indicating the basis for the State Director's appeal" and "an opportunity to reply to such a statement." I did not hear from

Affidavit of Oliver T. Fein in Support of Motion
(Exhibit T—Continued)

the State Director, the Southern District Appeal Board or the local board, until I received the notice that I had been reclassified I-A by a vote of 4 to O by the Southern District Appeal Board.

I believe, the following injustices have occurred with regard to my case.

1. The autonomous opinion of the local board has been contradicted by the opinion of the appeal board, in the circumstance in which the opinion of the local board was challenged by the State Director rather than myself.
2. The State Director, to this time, has not stated to me, the basis for his challenging the local board's judgment, with regard to my case.
3. The local board did not give me an opportunity to submit additional information to my file before forwarding it to the appeal board.
4. I was given no opportunity to present rebuttal to the State Director's reasons for challenging my classification of I-O, whatever they may be.
5. I was granted no right to personal appearance before the appeal board.

Since the appeal board was unanimous, I have no appeal to the Presidential Appeal Board. However, the National Director of Selective Service may take such an appeal if it is "in the national interest or necessary to avoid an injustice."

Therefore, I am asking you, as National Director of the Selective Service System, to review my file and raise my case to the Presidential Appeal Board. I also request that you instruct the local board #7 to withhold issuance of induction orders

until you have had the opportunity to review my case. I realize that the State Director also has this authority, but it obviously would be useless to ask him to do this.

I believe a grave injustice against me cannot be avoided without your intervention. I anticipate your fullest consideration and cooperation.

Sincerely yours,

Oliver Fein, M.D. SS#30-7-40-172

cc: State Director
Local Board #7

Approval Not Required.

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

PHYSICIAN

"SPECIAL CLASS No. 42 DOCTOR OF MEDICINE"

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701

(LOCAL BOARD STAMP)

JUL 31 1968

(Date of mailing)

SELECTIVE SERVICE NO.			
30	7	40	172

The President of the United States,

To

Dr. Oliver T. Fein
11605 Fairport Ave.
Cleveland, Ohio 44108

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

at LOCAL BOARD OFFICE 45 SO. B'WAY, FIRST FLOOR, ROOM 111 YONKERS, N Y
(Place of reporting)

on SEP 6 1968 (Date) at 7:15 A. M. (Hour)

for forwarding to an Armed Forces Induction Station.
AFEES
CLEVELAND, OHIO

Exe. Secretary (Member or clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form 252 (Revised 4-28-65) (Previous printings may be used until exhausted.) U.S. GOVERNMENT PRINTING OFFICE 1968 O—766-188

73/74
Fein Affidavit: Exhibit U

Approval not required

SELECTIVE SERVICE SYSTEM

POSTPONEMENT OF INDUCTION

LOCAL BOARD NO. 7
45 SOUTH BROADWAY
ROOM 111, 1ST FLOOR
YONKERS, N.Y. 10701
(Local Board Stamp)

August 29, 1968
(Date)

PHYSICIAN

To: OLIVER T. FEIN, Selective Service No. 30 | 7 | 40 | 172
(Name of registrant)

Address: 11605 Fairport Ave.
(Number and street or R. F. D. route)

Cleveland, Ohio 44106
(City, town, or village) (County) (State) (Zip Code)

1. By authority of Section 1632.2(a) Selective Service Regulations your induction into the armed forces heretofore fixed for SEPTEMBER 6, 1968 (Date) in Order to Report for Induction (SSS Form 252) issued by this local board on JULY 31, 1968 (Date) is hereby POSTPONED until pending review by National Headquarters (Date)

You will be advised by this local board as to the date you will present yourself to this board for delivery for induction after termination of this postponement

2. This postponement will terminate if at any time the reasons therefor should cease to exist. If the reasons for this postponement should cease to exist, it is your duty to report that fact immediately to this local board.

3. It is your continuous duty to report for induction at such time and place as may hereafter be fixed by this local board.

Evelyn L. Foley
(Signature of local board)
Executive Secretary

SSS Form 304 (Revised 10-28-66). Supplies of previous printings may be used

75/76
Fein Affidavit: Exhibit V

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT X

[Annexed to above affidavit]

Letter of Oliver Fein Declining Appointment

11605 Fairport Avenue
Cleveland, Ohio 44108
August 20, 1968

Holland W. Starkay, LTC
Departmen of the Army
Fort George Meade
Maryland, 20755

Dear Sir:

This is to advise you that I cannot accept an appointment as a commissioned officer in the Armed Forces. This is so, primarily for two reasons:

(1) I am a conscientious objector, and therefore opposed to military service. My local Selective Service Board has recognized the validity of my claim to I-O status. However, the State Selective Service Appeal Board has reversed the decision of the local board, for reasons unknown to me. Therefore, I have asked Gen. Lewis B. Hershey to review my file and raise my case to the Presidential Appeal Board.

2. Presently my file is being reviewed by the National Headquarters of Selective Service in consideration of my request for raising my case to the Presidential Appeal Board.

Thank you for your kind attention.

Sincerely yours,

Oliver Fein, M.D.
SS#30-7-40-172

cc: Local Board #7

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT Y

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D.C. 20435

September 16, 1968

NOTICE OF APPEAL TO THE NATIONAL SELECTIVE SERVICE APPEAL BOARD

To: Local Board No. 7, Yonkers, New York

Registrant: Oliver T. Fein
SS No. 30-7-40-172

An appeal to the National Selective Service Appeal Board from classification of the above-named registrant by the Appeal Board in class I-A is hereby entered in the name of the Director of Selective Service as is provided in Section 1627.1 of the Selective Service Regulations.

For The Director,

/s/G.J. WENDEL
Colonel, OrdC
Special Assistant to the Director

EXHIBIT Z

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D.C. 20435

September 16, 1968

State Director of Selective Service
Federal Building
441 Broadway
Albany, New York 12207

Subject: Oliver T. Fein
SS No. 30-7-40-172

Dear Colonel Boughton:

Notice of Appeal to the National Selective Service Appeal Board in the name of the Director of Selective Service has been placed in the cover sheet of the registrant.

Please inform the local board of this action.

The registrant's current address is shown to be 11605 Fairport Avenue, Cleveland, Ohio 44100.

For the Director

G.J. WENDEL
Colonel, OrdC
Special Assistant to the Director

EXHIBIT AA

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

SELECTIVE SERVICE SYSTEM
NEW YORK STATE HEADQUARTERS
Federal Building, 441 Broadway
Albany 12207

September 20, 1968

Dr. Samuel Tunick
Chairman, Local Board No. 7
45 So. Broadway
Yonkers, New York

Subject: FEIN, Oliver T., M.D.
SS No. 30-7-40-172

Dear Dr. Tunick:

We are enclosing a copy of a letter dated September 16, 1968 addressed to the State Director from National Headquarters advising that the Director of Selective Service is taking an appeal to the National Selective Service Appeal Board in the case of the above named registrant.

Under the provisions of section 1627.8 of Selective Service Regulations, the registrant's order to report for induction should be cancelled.

Kindly advise the registrant of the above actions.

For The State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure
cc: Manpower Section

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT BB

[Annexed to above affidavit]

Notice of Appeal to National Appeal Board

Local Board No. 7
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

September 23, 1968

RE: SS No: 30-7-40-172

Dr. Oliver Fein
11605 Fairport Ave.
Cleveland, Ohio 44108

Dear Dr. Fein:

Please be advised that we have been advised that the Director of Selective Service is taking an appeal to the National Selective Service Appeal Board in your case.

You are further notified that because of this action your order to report for INDUCTION on September 6, 1968 has been CANCELLED.

As soon as your file is returned to this local board we will notify you of the out-come of this review, and appeal.

By Direction
Local Board #7

/s/Evelyn L. Folly
Executive Secretary

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT CC

[Annexed to above affidavit]

Request for Grounds for State Director's Appeal

11605 Fairport Avenue
Cleveland, Ohio 44108
October, 1, 1968

New York State Director
Selective Service System
441 Broadway
Albany, New York 12207

Dear Sir:

I would like to request, for the second time, a statement from you indicating the basis for your action of raising my classification of I-O, granted me by Local Board #7, to the Southern District Appeal Board. I could not then, nor can I now, imagine on what grounds you questioned my classification of I-O.

I am writing you about this matter now, because the Director of Selective Service is presently taking an appeal to the National Selective Service Appeal Board in my case. I would like the opportunity to submit any new information to the National Selective Service Appeal Board, which might arise in answering a statement of your reasons for raising my classification of I-O to the Southern District Appeal Board.

Many thanks for your anticipated cooperation.

Sincerely yours,

Oliver Fein, M.D.
SS #30-7-40-172

cc: Local Board #7
National Selective Service (Presidential) Appeal Board

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT DD

[Annexed to above affidavit]

Request for Grounds for State Director's Appeal

11605 Fairport Avenue
Cleveland, Ohio
October 28, 1968

Col. John W. Brokaw
Deputy State Director
New York State Selective Service
441 Broadway
Albany, New York 12207

Dear Col. Brokaw:

Your letter of October 7, 1968, did not answer my request, as stated in my letter of October 1, 1968. As I wrote in that letter, I am aware that the Director of Selective Service Appeal Board [has appealed my classification.]* It is precisely because of that appeal, that I reiterated my request to obtain a statement from the New York State Director of Selective Service, concerning the basis for his appeal of the local board's classification of I-O.

I ask again at this time, for such a statement from the State Director so that any new information which might be raised by such a statement could be entered into my file before consideration by the National Selective Serviee Appeal Board.

I hope the matter of my request is clear, and look forward to your kind cooperation.

Sincerely yours,
Oliver Fein, M.D.

OF/de
cc: Local Board No. 7
National Selective Service Appeal Board

*bracketed portion intended in original letter.

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT EE

[Annexed to above Affidavit]

Answer to Request for Grounds for State Director's Appeal

October 31, 1968

Oliver Fein, M.D.
11605 Fairport Avenue
Cleveland, Ohio 44108

SS No. 30-7-40-172

Dear Dr. Fein:

We wish to acknowledge your letter of October 28, 1968, and to advise that it was the opinion of the State Director of Selective Service that you did not qualify for a deferment in Class I-O as a conscientious objector.

The State Director's decision was based upon the information contained in you selective service file.

For The State Director

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

cc: LB #7

EXHIBIT FF
[Annexed to above Affidavit]

Minutes of Presidential Appeal Board

NATIONAL SELECTIVE SERVICE APPEAL BOARD
1724 F STREET NW.
WASHINGTON, D.C. 20435

MINUTES OF ACTION UPON APPEAL TO THE PRESIDENT

Presidential Appeal No. 16,136

Name of Registrant FEIN (M.D.) Oliver T.
(Last) (First) (Middle)

Selective Service Number: 30 7 40 172

Local Board No. 7 City Yonkers State New York

Classified I-A

Vote: Yes 3 No 0

Date November 26,1968

Henry J. Guiazda
Judge Henry J. Guiazda, Chairman

Dr. Kenneth W. Clement, Member

C N Collates
Commissioner Charles N. Collates, Member

Affidavit of Oliver T. Fein in Support of Motion

EXHIBIT GG

[Annexed to above Affidavit]

Notice of Presidential Appeal Board Decision

SELECTIVE SERVICE SYSTEM
STATE HEADQUARTERS
FEDERAL BUILDING
441 Broadway
Albany, New York 12207
December 6, 1968

Chairman
Local Board No. 7

Subject: FEIN, OLIVER T. (M.D.)
SS No. : 30-7-40-172

Dear Sir:

Returned is the Cover Sheet (SSS Form 101) of the subject registrant who was classified by the

[xxx] National Selective Service Appeal Board

[ ] District Appeal Board for the State of

in Class I-A
on November 26, 1968
by a vote of 3 - 0

Kindly acknowledge receipt of the enclosed Cover Sheet by signing and returning the duplicate of this letter.

For The State Director

/s/JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Enclosure

Cover Sheet received on _____ by _____

NOTICE OF MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
Southern District of New York

69 Civ. 531

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; *et al.*,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the Complaint herein, the affidavit of OLIVER T. FEIN, sworn to the 6th day of February, 1969, and the exhibits annexed thereto, the undersigned will move this court at a Motion Part thereof to be held in Room 506, United States Court House, Foley Square, New York, New York, on the 25th day of March, 1969 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting plaintiff a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a permanent injunction, for declaratory judgment pursuant to 28 U.S.C. 2201 *et seq.*, and for summary judgment pursuant to

Notice of Motion of Plaintiff for Preliminary Injunction, Permanent Injunction, Declaratory Judgment and Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure, and for such and further relief as this court may deem just and proper.

March 6, 1969

/s/MICHAEL STANDARD
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
OX 7-8640

TO: SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 7, Yonkers, New York

SELECTIVE SERVICE APPEAL BOARD
FOR THE SOUTHERN DISTRICT OF NEW YORK

COL. JOHN W. BROKAW, Acting Director,
New York Selective Service System

NEW YORK SELECTIVE SERVICE DIRECTOR

NATIONAL SELECTIVE SERVICE APPEAL BOARD

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Affidavit of Martin Paul Solomon In Opposition To Plaintiff's Motions, And In Support Of Defendant's Motion To Dismiss The Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARTIN PAUL SOLOMON being duly sworn deposes and says, upon information and belief:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the defendants in this action, and as such am familiar and in charge of this case.

2. This is an action by plaintiff for a preliminary injunction staying the induction of plaintiff into the Armed Forces of the United States and for summary judgment declaring the appellate procedure of the Selective Service System unconstitutional.

3. Registrant was born on May 5, 1940, and first registered with the Selective Service System on May 22, 1958. Registrant was not a conscientious objector at the time of his initial registration. The registrant graduated from Swarthmore College in June of 1962 with a baccalaureate degree in political science. By letter dated June 24, 1962, the registrant notified his local draft board that he was entering graduate school at the University of Pittsburgh, as a graduate student in political science.

By letter dated October 10, 1962, Local Board No. 7 was advised by Columbia University that the registrant planned to

enter medical school in September, 1963, and that Mr. Fein was then officially registered with the pre-medical office of Columbia University.

Registrant entered the school of medicine of Western Reserve University in September of 1963, from which he was graduated in June, 1967.

By notice dated June 27, 1967, Dr. Fein was ordered to report for a physical examination. By letter dated September 12, 1967, Dr. Fein declared himself a conscientious objector and requested Local Board No. 7 to forward to him the appropriate conscientious objector forms.

By reason of his medical internship at Cleveland Metropolitan Hospital, Dr. Fein was classified II-A (internship) on July 19, 1967. On November 15, 1967, the registrant had a personal appearance with Local Board No. 7, to discuss his claim as a conscientious objector. On February 14, 1968 Local Board No. 7 rejected the registrant's request to be classified as a conscientious objector and classified him I-A. Upon receipt of said advice, registrant requested a new appearance and as a result of this new appearance was reclassified by the local board as a conscientious objector (I-O) on May 22, 1968.

4. By letter dated June 4, 1968, the State Director of Selective Service appealed registrant's I-O classification. See Exhibits A and B. Dr. Fein was notified of said appeal. See Exhibit C. On June 20, 1968, the Appeal Board for the Southern District of New York reclassified registrant I-A. See Exhibit D. On September 16, 1968, the Director of Selective Service appealed said I-A classification to the National Selective Service Appeal Board. See Exhibit E. Dr. Fein was advised of said appeal to the National Selective Service Appeal Board. See Exhibit F. In answer to a request by Dr. Fein as to why the State Director appealed the I-O classification of the local board, the State Director advised Dr. Fein by letter dated October 31,

1968, that in his opinion Dr. Fein did not qualify for deferment as a conscientious objector and that his decision was based upon the information contained in Dr. Fein's Selective Service file. See Exhibit G.

On November 26, 1968, the National Selective Service Appeal Board classified Dr. Fein I-A by a unanimous vote of three to zero, thereby affirming the classification of the Appeal Board of the Southern District of New York. See Exhibit H.

5. Registrant was asked at both of his personal interviews whether he would be willing to work in an institution as a conscientious objector doing civil work in the national interest. He replied that he would.

6. If Dr. Fein were inducted into the Armed Services and if he requested officer status as a doctor, he would be commissioned a captain and receive base pay of $658.50 per month plus special doctor's pay of $100 per month. Dr. Fein would be credited with the four years he spent in medical school in ascertaining this base pay. The above referred to $758.50 per month would be taxable. In addition, Dr. Fein would receive 130.05 per month for quarters, which is the monthly rate for a married officer, and an additional $47.88 per month for subsistence. Accordingly, Dr. Fein would receive $9,102 a year of taxable income together with an additional $2,135.16 per year as a non-taxable allowance for quarters and subsistence.

7. The information contained in this affidavit and the exhibits annexed hereto was obtained from the Selective Service file for the registrant. The information contained in paragraph 6 was obtained from Colonel Daniel Lewis, a field attorney for the Selective Service System.

WHEREFORE, it is respectfully requested that the motion for preliminary injunction and summary judgment be denied and that the complaint be dismissed for lack of subject-matter jurisdiction.

Affidavit of Martin Paul Solomon
in Opposition to Plaintiff's Motions

MARTIN PAUL SOLOMON
Assistant U.S. Attorney

Sworn to before me this
8th day of April, 1969.

[Exhibits A-H of the Solomon affidavit are omitted here and are included as exhibits to the affidavit of Oliver Fein, *supra*]

AFFIDAVIT OF MICHAEL B. STANDARD IN SUPPORT OF PLAINTIFF'S MOTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MICHAEL B. STANDARD, being duly sworn, deposes and says:

1. I am a partner in the firm of Rabinowitz, Boudin & Standard, attorneys for the plaintiff herein. I make this Supplemental Affidavit after hearing in support of plaintiff's motions for injunctive relief and summary judgment.

2. Central to the Government's position that there is no due process right of the registrant to submit additional or rebutting information to the Appeal Board is the Government's assertion that the Appeal Board, consistent with 32 CFR 1626.24, has before it for *de novo* review purposes, only the record submitted to the local board.

3. Both in the Government's brief and at oral argument, it stated unequivocally that neither the State Director nor any other body or officer submitted any information to the Appeal Board other than what appeared in the registrant's file as reviewed by the Local Board. Construed most charitably, the Government is in error.

4. On June 20, 1968, the day the Southern District Appeal Board found the registrant not to be appropriately classified in I-O, Miss Jacqueline Jones, Assistant Appeal Board Clerk, by direction of the Southern District Appeal Board forwarded a memorandum to the registrant's local board which in pertinent part stated as follows:

"... [P]lease be advised that we have already made up *the brief* on the above-named subject, and is to go into today's meeting (June 20, 1968)." [Emphasis added]

This quotation is part of a memorandum which is annexed hereto as Exhibit A, and was photocopied from the registrant's Selective Service File.

5. The Government refers to a representation by the Deputy state Director that "it is our opinion that the registrant would not qualify for I-O classification..." (Govt. Ex. B) as conclusive evidence that the Deputy State Director submitted no additional information to the Appeal Board. While it is not clear that the State Director drafted "the brief" referred to in Exhibit A annexed hereto, it is perfectly clear that the Appeal Board had before it material of which the registrant was never advised.

WHEREFORE it is respectfully requested that plaintiff's motions for preliminary injunctioln and summary judgment be granted.

/s/ Michael B. Standard

Sworn to before me this
29th day of April, 1969.

/s/ Theresa Silverstein

Affidavit of Michael B. Standard
in Support of Plaintiff's Motions

EXHIBIT A
[Annexed to above affidavit]

Memo to Local Board No. 7 from Southern District Appeal Board

SELECTIVE SERVICE SYSTEM

[Local Board Stamp)

Memorandum to: Local Board No. 7
From: Southern District Appeal Board
Yonkers, New York 10701

SUBJECT: FEIN, OLIVER T.
S.S. No: 30 7 40 172

Please be advised that we are in receipt of a letter from Doctor Frederick O. Robbins, attesting Doctor Oliver T. Fein feelings towards Conscientious Objector.

However, please be advised that we have already made up the [brief] on the above-named subject, and is to go into today's meeting (June 20, 1968).

By Direction
Southern District Appeal Board

/s/ Jacqueline Jones
Assistant Appeal Board Clerk

AFFIDAVIT OF MARTIN PAUL SOLOMON IN RESPONSE TO THE AFFIDAVIT OF MICHAEL B. STANDARD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARTIN PAUL SOLOMON being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the defendants in this action, and as such am familiar and in charge of this case.

2. I submit this affidavit in response to the affidavit of Michael B. Standard, sworn to on April 29, 1969.

3. Upon information and belief, the "brief" referred to in the memorandum of June 20, 1968, annexed as Exhibit A to Mr. Standard's affidavit, is merely a summary of the registrant's Selective Service file which is submitted to the members of the appeal board together with the registrant's file. The "brief" is prepared by an employee of the appeal board and does not contain any information not contained within the file.

4. The information contained in this affidavit was ascertained by your deponent from telephone conversations with Jaqueline Jones who signed the June 20, 1968 memorandum annexed as Exhibit A to Mr. Standard's affidavit, with Mrs. Anna B. O'Hara, Clerk of the Southern District Appeal Board, and with Colonel Meader of the Selective Service State Headquarters.

/s/MARTIN PAUL SOLOMON
Assistant U. S. Attorney

Sworn to before me this
6th day of May, 1969.

MEMORANDUM OPINION OF THE COURT

UNITED STATES DISTRICT COURT
Southern District of New York

69 Civ. 531

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; *et al.*,

Defendants.

MEMORANDUM

Tyler, D.J.

Oliver Fein moves to preliminarily enjoin his local draft board and the appellate hierarchy of the selective service system from ordering him to report for induction into the Armed Forces of the United States. He moves also for summary judgment declaring that Section 460(a)(2) of the Military Selective Service Act, 50 App. U.S.C. §460(a)(2) (1968) and certain selective service regulations, 32 C.F.R. 1626.1 and 1627.1(a)(b), violate the due process clause of the Fifth Amendment, both on their face and as applied to him.

The registrant, a medical doctor currently practicing in the field of community and public health in Cleveland, Ohio, graduated from Swarthmore College in June, 1962, and Western Reserve University Medical School in June, 1967. He held a II-S (student) classification for the duration of his academic career, and upon graduation from medical school, he was granted a II-A

classification (work in the national interest) during his one year internship in pediatrics at Cleveland Metropolitan General Hospital. In September, 1967, while an intern, plaintiff sought conscientious objector status from his draft board, Local Board No. 7, located in Yonkers, New York. That classification was denied him and remained II-A. In February, 1968, upon being notified by his local board that he had been reclassified I-A, plaintiff again sought and then received conscientious objector status (I-O).

About two weeks after the local board's action, plaintiff's I-O classification was appealed by the State Selective Service Director to the Appeal Board for the Southern District of New York. Plaintiff at once sought from the local board and the appeal board a statement of reasons for the appeal but received, in his words, "no pertinent response". On June 20, 1968, the Appeal Board for the Southern District of New York overturned the actions of the local board and reclassified plaintiff I-A by a vote of 4-O. No reasons for the action of the appeal board were furnished to plaintiff. On September 16, 1968, the National Selective Service Director, at the prompting of plaintiff, appealed the action of the district appeal board to the Presidential Appeal Board, with notice to plaintiff. Prior to the decision of the Presidential Appeal Board, the State Selective Service Director, in response to a request by plaintiff, informed him by letter of October 31, 1968, that in his opinion plaintiff did not qualify for deferment as a conscientious objector and that his decision to appeal the local board's action was based upon the information contained in plaintiff's selective service file. On November 26, 1968, the Presidential Appeal Board, without a statement of reasons, upheld the action of the district appeal board, thereby retaining plaintiff in the I-A classification.

Plaintiff alleges here that Section 460(a)(2) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(a)(2) and 32 C.F.R. §§1626.1 and 1627.1 are unconstitutional in that: (1) they do not require notification to a registrant of the reasons for appeal by the State Selective Service Director; (2) they do not require a statement of reasons for a decision by the Selective Service District Appeal Board or by the Presidential Appeal Board; and (3) they do not offer a registrant the opportunity to present evidence at either the intermediate or the final appeal level. In short, plaintiff finds the statutory scheme for appeals, as implemented by the subject regulations, unconstitutional because it makes no provision for a statement of reasons for the actions of the various bodies and allows no opportunity to present evidence.

I do not reach the merits of these contentions in this action. Plaintiff's complaint is beset by various obstacles, not the least of which is the question of whether he can show jurisdiction of this court to hear this suit. Assuming, *arguendo*, that he can, he must also show that this court is not barred from exercising that jurisdiction by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(b)(3). I conclude that he cannot make this latter showing.

Section 10(b)(3) prohibits pre-induction judicial review "of the classification or processing of any registrant," such review being limited to a defense in a criminal prosecution or to habeas corpus after induction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be

opposed to participation in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Without elaborate analysis, Section 10(b)(3), when read in light of the Supreme Court decisions in *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and *Clark v. Gabriel*, 393 U.S. 256 (1968), bars pre-induction review where plaintiff seeks to challenge a determination of fact, or an exercise of judgment or discretion by the local board, or, in this case, the appellate boards. The point is well made in *Clark v. Gabriel, supra* where the Court draws a distinction between *Oestereich*, where the Court held that pre-induction judicial review would not be barred by Section 10(b)(3), and *Clark*, where the Court held that such review would be barred:

"In *Oestereich* the deliquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment, By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being sustained by the local board.

Here the Board has exercised its statutory discretion to pass on a particular request for classification, 'evaluating evidence and. . .determining whether a claimed exemp-

> tion is deserved'. *Oestereich v. Selective Service Bd.*, *ante*, at 238." 393 U.S. at 258.

Thus, it can be reasoned that plaintiff does not seek to challenge such a discretionary determination. Rather, he challenges, on a strict legal or constitutional basis, the selective service appellate scheme as provided in the statute and relevant regulations. Consequently, my understanding, summarized above, of *Oestereich* and *Clark* at first blush would seem to justify the conclusion that plaintiff's action is not barred by Section 10(b)(3). A more recent Supreme Court case, however, vitiates this simple rationale.

In *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd.* 393 U.S. 316 (1969), four selective service registrants challenged the constitutionality of the student deferments provided in Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1) (1968) on grounds that the student deferments (1) discriminate against persons who are economically unable to attend college and (2) are arbitrary and bear no reasonable relationship to the purpose of the Act. The registrants, all classified I-A and alleging that they were unable to secure student deferments solely because they lacked the financial means to attend college, sought a declaratory judgment that the Act was unconstitutional as applied to them and injunctive relief. A three-judge panel in this district dismissed the action for lack of a justiciable controversy and for want of jurisdiction. This court reasoned that because the registrants had never been called for induction, and that there had been no showing that the amount in controversy exceeded $10,000, as required by 28 U.S.C. §1331 (1964), the claim was premature.

On direct appeal, the Supreme Court rules briefly as follows:

"Per Curiam

The judgment is affirmed, *Clark v. Gabriel, ante,* p. 256, without reaching the jurisdictional question raised under 28 U.S.C. §1331."

Confessing uncertainty as to the full meaning of the Court's cryptic citation of *Clark v. Gabriel* as the sole ground for affirmance in *Boyd v. Clark,* I nevertheless conclude that the latter case is dispositive of this case. Specifically, I am constrained to interpret the *per curiam* statement of the Supreme Court as an indication of its conclusion that the operative facts therein placed *Boyd v. Clark* in the class of pre-induction selective service suits barred by Section 10(b)(3) because they do not fit the exceptions carved out in *Oestereich*. As in *Boyd,* plaintiff here raises constitutional objections to a regulatory scheme administered by the selective service system. To be sure, certain facts and circumstances of *Boyd* are different in some respects from those in the case at bar; nevertheless, these differences, in my opinion, are insufficient to permit me to "distinguish" *Boyd* and refuse to apply its holding here.

Parenthetically, although neither plaintiff nor defendants have raised the point, this action could be interpreted as a suit to enjoin the operation of an act of Congress on grounds that it is repugnant to the federal Constitution. As such, it might provide the basis for a motion to empanel a three-judge district court under 28 U.S.C. §2282 (1964). A district judge, however, is entitled to dismiss such a complaint where the unsoundness of the constitutional question "so clearly results from the previous decisions of this [the Supreme] Court as to foreclose the subject. . . ." *Ex parte Poresky*, 290 U.S. 30, 31 (1933); *accord, California Water Service v. City of Redding*, 304 U.S. 252 (1938); see, also, the opinion of this court in *Green v. Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966), *aff'd*,

380 F. 2d 445 (1967), *cert. denied*, 389 U.S. 1048 (1968). Here, *Boyd v. Clark*, *supra*, effectively forecloses the jurisdictional issue.

Accordingly, plaintiff's motions are denied, and defendants' motion to dismiss the complaint is granted.

June 10, 1969.

/s/H.R. Tyler, Jr.
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 626—September Term, 1969.

(Argued March 24, 1970 Decided July 23, 1970.)

Docket No. 33737

OLIVER T. FEIN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*

HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order by the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing an action by a selective service registrant, seeking an injunction against his induction and a declaration that his reclassification into I-A by the appeal board after his local board had classified him I-O was null and void. Affirmed.

* Of the District of Connecticut, sitting by designation.

MICHAEL B. STANDARD, New York, N. Y. (Rabinowitz, Boudin & Standard, of counsel), *for Plaintiff-Appellant.*

PETER R. DEFILIPPI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Patricia M. Hynes, Assistant United States Attorney, of counsel), *for Defendants-Appellees.*

BLUMENFELD, *District Judge*:

Appellant is a doctor of medicine. While obtaining his education, he was classified II-S (student deferment), and upon graduation and while serving as an intern, he was classified II-A (occupational deferment). In September 1967, while still II-A, he wrote to the local board stating his conscientious objection to war and requesting the appropriate forms. He filed an application for a I-O (conscientious objector) classification and appeared before the local board. Finding that Fein did not qualify for a I-O "at that time," the board retained him in his II-A status. In February 1968 he was classified I-A by the local board, but following a personal appearance on May 22, 1968, that board found that he qualified as a conscientious objector and classified him I-O.

About two weeks later, this classification was appealed to the state appeal board by the State Director of Selective Service. 32 C.F.R. §1626.1 (1951). Appellant sought from both the local and appeal boards a statement of reasons for the appeal, notification of the standards to be applied on appeal, advice as to whether additional information outside his file was to be presented, and an opportunity to

rebut findings by the appeal board as to the appropriateness of his classification. He received no pertinent response before the decision of the appeal board was rendered. On June 20, 1968, the appeal board, by a vote of 4-0, reversed the local board and reinstated appellant in class I-A. It gave no reason for that action.

On September 16, 1968, the National Selective Service Director, at Fein's request (no right of appeal by the registrant being available from an unanimous vote of the appeal board, 32 C.F.R. §1627.3 (1967)), appealed the decision to the Presidential Appeal Board. 32 C.F.R. §1627.1(a) (1948). Meanwhile, on October 31, 1968, the state director wrote to Fein stating that in his opinion Fein did not qualify as a conscientious objector and that his decision to appeal the local board's I-O classification was based on information in Fein's selective service file. On November 26, 1968, the Presidential Board, without a statement of reasons, upheld the appeal board.

The appellant then brought this action in the district court seeking an injunction against his induction into the armed forces and a judgment that his reclassification from I-O to I-A was null and void.

Jurisdiction was predicated on 28 U.S.C. §§1331, 1343, 1361, 1391 and 2201, and on an allegation that the matter in controversy exceeded the value of $10,000 exclusive of interest and costs.[1]

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1 The Supreme Court has not yet ruled on the jurisdictional basis for an action by a selective service registrant seeking pre-induction review of his classification, although it has entertained several such cases on the merits. *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 239 (1968) (where the remand stated in part: "petitioner must have the opportunity . . . to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. §1331"); *Clark* v. *Gabriel*, 393 U.S. 256, 259 (1968) (where the Court granted leave to proceed *in forma pauperis*); *Boyd* v. *Clark*, 393 U.S. 316 (1969) (*affirming* 287 F. Supp. 561 (S.D.N.Y. 1968) "without reaching the jurisdictional question raised under 28

The plaintiff claimed that his reclassification from I-O to I-A violated his fifth amendment right to due process in that the regulations contained no provisions requiring notice to the registrant of the reasons for appeal by the State Selective Service Director, nor for a statement of the bases of decision by the respective appeal boards and did not provide for an opportunity to present evidence to rebut the state director's appeal.

Deciding that pre-induction judicial review of the plaintiff's classification was explicitly barred by 50 U.S.C. App. §460(b)(3) (§10(b)(3) of the Selective Service Act of 1967), Judge Tyler in a well-considered opinion denied the plaintiff's motion for summary judgment and dismissed the complaint for lack of subject matter jurisdiction. We agree.

Congress amended §10(b)(3) in 1967 to add an explicit bar to judicial review

> "of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

in answer to *Wolff* v. *Selective Serv. Bd.*, 372 F.2d 817 (2d Cir. 1967), which had permitted pre-induction judicial review of local board reclassifications of two II-S registrants into class I-A because of their participation in a demonstration protesting American involvement in Vietnam. Within a year after the amendment, a challenge to its scope reached the Supreme Court in *Oestereich* v. *Selective Serv. Bd.*, 393

U.S.C. §1331"). Peremptory dismissal is seldom ordered unless it appears to a legal certainty that the claim is for less than the jurisdictional amount. *St. Paul Mercury Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283, 290 (1938). In this case, the court below did not reach the issue.

U.S. 233 (1968). Oestereich was a divinity student admittedly entitled to a statutory exemption from military service under §6(g) of the Act, 50 U.S.C. App. §456(g) (1967). His draft board declared that he was a delinquent and simultaneously reclassified him as I-A for having turned in his draft card in protest to American participation in the Vietnam war. Finding that the board had acted in a "blatantly lawless manner" by depriving him of his "statutory right" to an exemption, *id.* at 238-39, the Court held that to read the amendment literally to deny pre-induction review in such a case would be "to construe the Act with unnecessary harshness." *Id.* at 238.

Having departed to that extent from a literal reading of §10(b)(3),[2] the Court undertook to elaborate its *Oestereich* holding through its opinion in *Clark* v. *Gabriel*, 393 U.S. 256 (1968), decided the same day. *Clark* v. *Gabriel* held that §10(b)(3) of the Act barred pre-induction review of the denial of a claim to classification as a conscientious objector. The Court explained *Oestereich* as a case where the board action was "without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption." *Id.* at 258. Sharply distinguishing that situation[3] from the one before it, the Court said:

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2 The Court in *Oestereich* also noted that while §10(b)(3) on its face purports "to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.* at 238.

3 *Breen* v. *Selective Serv. Bd.*, 396 U.S. 460 (1970), was held indistinguishable from *Oestereich*. The Court found that because there was no lawful basis for the use of delinquency regulations in that case to warrant the revocation of a statutorily mandated student deferment, §10(b)(3) did not preclude pre-induction review.

> "Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment." *Id.*

And, to avoid any risk of being misunderstood, Mr. Justice Douglas, who wrote for the majority in *Oestereich*, concurred in *Gabriel*, and after noting some hypothetical examples of lawless board action, went on to say: "[I]t takes the extreme case where the Board can be said to flout the law, as it did in Oestereich [393 U.S. at 233], to warrant pre-induction review of its actions." *Id.* at 260.

These two decisions by the Court convincingly dispel the notion that pre-induction review may be obtained simply by framing issues in terms of purely legal questions divorced from their factual context,[4] a tour de force attempted by the appellant in this case.

The limitation of pre-induction review to cases of "blatantly lawless" action by the board gained further confirmation in *Boyd* v. *Clark*, 393 U.S. 316 (1969), which affirmed a denial of pre-induction review to registrants classified I-A, in a one-sentence per curiam opinion: "The judgment is affirmed, Clark v. Gabriel [393 U.S. at 256], without reaching the jurisdictional question raised under 28 U.S.C. §1331." In *Boyd*, the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I-A. *See* opinion below, *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among

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4 The government's Jurisdictional Statement in *Gabriel* shows that Gabriel raised several constitutional issues which could have been passed on without inquiry into findings of fact or exercise of discretion by the local board. See *Breen* v. *Selective Serv. Bd.*, 406 F.2d 636, 639 (2d Cir. 1969), *rev'd on other grounds*, 396 U.S. 460 (1970).

the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Although the law of new cases may never be open and shut,[5] we have been furnished with sufficient guidance to hold that an appeal board does not flout the law in a blatantly lawless manner merely because the President has not provided certain procedural safeguards to govern the Selective Service System's administrative tribunals in determining whether a registrant is a genuine conscientious objector not "subject" to combatant training or service under §6(j) of the Act, 50 U.S.C. App. §456(j) (1967). See *Falbo* v. *United States*, 320 U.S. 549, 554 (1944). Cf. *Estep* v. *United States*, 327 U.S. 114 (1946).

The appellant had no clear statutory right to a I-O classification. Allegations of constitutional infirmities in the classification procedures did not bring this case within any exception to the bar of §10(b)(3).

Accordingly, the order of Judge Tyler dismissing the complaint is affirmed.

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5 The view that §10(b)(3)'s proscription against pre-induction review imposes such a risk of severe penalty as to "raise serious constitutional problems" in challenges to the administrative procedure of classification itself without accompanying challenges to matters within the local board's discretion was suggested by Mr. Justice Harlan in his concurring opinion in *Oestereich*, 393 U.S. at 243, as a basis for a broader holding than that adopted by the majority of the Court. That view was implicitly rejected without discussion in *Boyd* v. *Clark*, 393 U.S. at 316.

Nor was the majority in *Breen* yet ready to adopt his view, again expressed by way of a concurring opinion in that case, that pre-induction review should not be limited to cases where there is a deprivation of a clear statutory right to a certain classification. Without reweighing all the values, the present rule does give some recognition to the purpose of Congress to limit pre-induction review.

HAYS, *Circuit Judge* (concurring):

I concur in Judge Blumenfeld's opinion in regard to §10(b)(3) but would also rely upon failure to establish the jurisdictional amount under §1331 as a ground for affirming the trial court's dismissal of the action. See *Boyd* v. *Clark*, 287 F. Supp. 561 (three judge court) (S.D.N.Y. 1968), aff'd on other grounds 393 U.S. 316 (1968).

LUMBARD, *Chief Judge* (dissenting):

I dissent.

After lengthy correspondence, two personal interviews, and extensive personal testimonials, Dr. Fein was granted conscientious objector status by his local board. The State Director, without stating any grounds, appealed the classification, and the State Appeal Board reversed and reclassified Fein I-A. The State Appeal Board gave no reasons for its decision, it did not permit Fein to submit a statement in support of his classification, and it may not even have relied solely on information in the file. In this suit to enjoin his induction Fein argues that such treatment does not meet minimum standards of due process, as developed by the federal courts over the last three decades. See, e.g., *United States* v. *Morgan*, 304 U.S. 1, 18 (1938). I agree.

The majority, however, holds that, as interpreted by the Supreme Court, Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(a)(2), bars the preinduction review sought by Dr. Fein. I cannot accept my brothers' readings of the relevant Supreme Court decisions. To me, Fein's claim is not barred by the literal words of Section 10(b)(3), and I think the exception to that section recognized by the court in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1969) reaches this case as both

here and in *Oestereich* a presidental regulation must fall to a higher command. I would also hold that the $10,000 jurisdiction amount required by 28 U.S.C. §1331 is satisfied by Fein's allegations.

I. *Section 10(b)(3)*

The language of Section 10(b)(3) prescribes preinduction review "of the classification or processing of any registrant." Concurring in *Oestereich*, Mr. Justice Harlan gave a gloss to those words which I accept. He read "classification or processing" to encompass "the numerous discretionary, factual and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction." 393 U.S. at 240. At issue in this case, however, are procedural rules governing appeals to the State and Presidential Appeal Boards, and I do not read Section 10(b)(3) as explicitly barring a claim that the procedures involved are invalid under the due process clause. At stake is not a board determination "processing or classifying" the registrant, but the procedures underlying the way such determinations are made.[1]

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1 This interpretation of the section is reinforced by its legislative history. In his *Oestereich* concurrence, Mr. Justice Harlan isolated two major considerations behind Congress' decision to defer judicial review of decisions involving classification or processing. First, because these determinations are of a highly discretionary nature, judicial review—although narrow—still would take considerable time, as often the courts must examine board records, hear testimony, and resolve controversies on a sizeable record. Second, it can be presumed that, with the full opportunity to be heard afforded by the system, a registrant's board has classified him properly, in accordance with the applicable statutes and regulations. See 393 U.S. at 240-41.

These factors, as Mr. Justice Harlan points out, are significantly altered when the registrant challenges a procedure used by the system. This sort of claim does not require the court to review discretionary determinations, so there is no protracted delay; usually, the case can be tried on a stipulated set of facts. Further, there can be no presumption of regularity, since the issues raised are beyond the system's

My brothers argue, however, that this interpretation of Section 10(b)(3) is foreclosed by the opinions of the court in *Oestereich, Breen* v. *Local Board No. 10,* 396 U.S. 460 (1970), and *Clark* v. *Gabriel,* 393 U.S. 256 (1968). A reading of these cases leads me to the opposite conclusion, as I find the claim of Board "lawlessness" Fein raises to be substantially similar to the situations presented in *Oestereich* and *Breen.*

Oestereich was enrolled as a divinity student preparing for the ministry when he turned in his draft card to protest the United States' participation in the war in Vietnam. Shortly thereafter, his local board declared him delinqent for failure to have his registration certificate in his possession and to keep the board informed of his local status. The Board then reclassified him I-A and, after an unsuccessful appeal, he was ordered to report. At that point, he brought suit to restrain his induction. *Breen* is quite similar, save that the petitioner was a college student with a II-S deferment when he was declared delinquent and reclassified I-A.

In *Oestereich,* the court framed the question presented as whether Section 10(b)(3) barred a preinduction challenge to a reclassification based on the delinquency regulation. The court held, first, that as there was no statutory authorization for the Board to revoke the statutorily-based ministerial exemption, its action was "basically lawless"; second, that Section 10(b)(3)'s restriction on preinduction re-

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competence, perhaps even its jurisdiction. On my reading of the legislative history, Congress passed Section 10(b)(3) to meet a specific problem: the vexatious delays caused by preinduction review of certain kinds of claims, see *Clark* v. *Gabriel,* 393 U.S. 256, 258-59 (1968). Had Congress wanted to prevent all registrants from seeking the aid of the federal courts on any matter involving the Selective Service System before induction, it would have used general language, not a specific prohibition covering only two areas.

view cannot, if it be constitutional, be read literally as a literal reading would command that the writ of habeas corpus be suspended; and third, that an exception must be implied to permit review of board actions which revoke a statutory right on the basis of a power conferred only by Selective Service regulations. *Breen* follows *Oestereich* closely, the only difference being that *Breen* had a statutory deferment rather than an exemption.

Clark v. *Gabriel*, 393 U.S. 256 (1968), decided the same day as *Oestereich*, confirmed Mr. Justice Douglas' statement in *Oestereich* that "[o]ur construction leaves §10 (b)(3) unimpaired in the normal operation of the Act." 393 U.S. at 238. Gabriel sought preinduction review of the board's refusal to grant him conscientious objector status. In holding that Section 10(b)(3) barred the suit, the court per curiam in a unanimous opinion explained *Oestereich*:

> "In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student was by statute, unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which the appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(j) (1964 ed. Supp. III)."

393 U.S. at 258. To me, Fein's claim falls squarely within the *Oestereich* exception.

In *Oestereich*, *Breen* and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority.[2] The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither *Oestereich*, *Breen*, nor this case are there any discretionary determinations of the system involved, nor are there any factual inquiries required. See *Bucher* v. *Selective Service System*, 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the *Oestereich* exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the *Oestereich* exception is to be read narrowly, so as to turn "on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification," *Breen* v. *Selective Service Bd.*, 396 U.S. 460, 468 (1970) (Harlan, J., concurring), I would recognize a third

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2 The Selective Service Acts themselves are silent about what procedures are to be followed on appeal; the only instructions are that appeals are authorized and are to be taken "in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. App. §460 (b)(3). On the effect of such a delegation generally, see *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the board administers are facially invalid." *Oestereich* v. *Selective Service System*, 393 U.S. at 240 (Harlan, *J.*, concurring). In *Oestereich* the court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 394 U.S. at 243 n. 6. My reading of the section and of its legislative history convinces me that Congress had no such intention. Of course, it is our duty to construe federal statutes, wherever possible, to sustain their constitutionality.[3] So, faced with the alternatives of a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intend and the statute's clear wording, I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the Constitution.

My brothers, however, would read the Supreme Court's one sentence, per curiam affirmance in *Boyd* v. *Clark*, 393 U.S. 316 (1969), on the basis of *Clark* v. *Gabriel*, to fore-

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3 See, e.g., *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932):

> "When the validity of an Act of Congress is drawn into question, and even if a serious doubt is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided."

See also *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, *J.*, concurring); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, *J.*, concurring).

close this exception. In my view, *Boyd* is completely distinguishable. The petitioners in *Boyd*, four college-age youths who alleged they could not afford to attend college, sought to challenge the constitutionality of student deferments on equal protection and due process grounds. Without reaching the effects of Section 10(b)(3), the three-judge district court dismissed on the ground that the case was not ripe for adjudication since none of the petitioners had yet been called for induction. 287 F. Supp. 561 (S.D.N.Y. 1968).[4]

The reasons for the rule are sound. Since the registrant may never be called, the rule serves to protect the system "from becoming entangled in litigation which may be unnecessary." *Boyd* v. *Clark*, 287 F. Supp. at 564. Although this rule predates Section 10(b)(3), Congress obviously intended that it be codified therein. See Senate Rpt. No. 209, 90th Cong., 1st Sess. (1967), 1967 U. S. Code & Admin. News 1308; *National Student Ass'n* v. *Hershey*, 412 F.2d 1103, 1107 (D.C. Cir. 1969).

In terms of *Clark* v. *Gabriel* petitioners in *Boyd* stood vis-a-vis their local boards in an unsettled position, as their boards might have to make several discretionary decisions, involving "a determination of fact and an exercise of judgment," *Clark* v. *Gabriel*, 393 U.S. at 258, before issuing orders to report. For example, the Board might be asked to consider new requests for exemptions or deferments, which of course involve discretion. Even determining the order of call is heavily tinged with discretion, as the local board has extensive powers to alter the order as between registrants with I-A status. See 32 C.F.R. §§1631.7, 1632.2;

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4 As an alternative grounds for dismissing the action, the court held that the jurisdictional amount requirement of 28 U.S.C. §1331 had not been met. In affirming, the Supreme Court specifically avoided this question. See part II *infra*.

United States v. *Weintraub*, slip opinion 3421 (2 Cir., June 23, 1970); *Green* v. *Local Board No. 87*, 419 F.2d 813 (8 Cir. 1970).

In affirming *Boyd* on the basis of *Clark* v. *Gabriel*, it seems to me that the court looked not to the nature of the issue presented—which, like Fein's claim, was solely a question of law based on a constitutional challenge—but to the fact that petitioners there had not reached a position of finality within the system. To allow suits before a notice of induction is received would create exactly the sort of "'litigious interruptions of procedures to provide necessary military manpower' which Congress sought to prevent when it enacted §10(b)(3)," *Clark* v. *Gabriel*, 393 U.S. at 255-256 (quoting Sen. Russell). As Fein has been ordered to report, *Boyd* v. *Clark* has no relevance to this case.

II. *Jurisdictional Amount*

Having found that Fein's action was barred by Section 10(b)(3), neither Judge Blumenfeld nor the district court reached the question of whether Fein's allegation that more than $10,000 was in controversy in the present action satisfied the requirements of 28 U.S.C. §1331 (1964). My brother Hays, however, advances jurisdictional amount as a second ground for affirming the judgment below, and with this I disagree.

Judge Hays, arguing from the position he expressed in his opinion in *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), begins with the proposition that the amount in controversy must be reasonably capable of monetary valuation. He then would find the jurisdictional amount here unsatisfied even though Fein was never allowed to prove his allegation, so his second proposition must be that because the value of the rights denied is inherently incapable

of valuation, a registrant can never satisfy Section 1331. Any such per se rule, however, has recently been rejected by this court. In *Berk* v. *Laird*, slip op. 3379, 3385 (June 19, 1970), we held that a soldier who alleges that he is being unconstitutionally ordered into a war zone has met the requirements of Section 1331, since the allegedly unconstitutional action of the government might lead directly to his suffering serious injury or death.

Berk demonstrates that when traversing a jurisdictional allegation, the defendant has a heavy burden. Moreover, the Supreme Court has made it clear that

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 283, 288 (1938). Although Fein seeks an injunction, not money damages, the same rule applies, with the inquiry looking to "the value of the right to be protected or the extent of the injury to be prevented." C. Wright, Federal Courts, §34, at 116 (2d ed. 1970). For all that appears at this stage, Fein's allegation may rest on a good faith belief that service will result in monetary loss: he may be deprived of several years lucrative private practice or an opportunity for further, specialized training which will permit him to earn more later in his career. In the absence of bad faith or a legal certainty that the allegation is groundless, we must credit the claim. Fein certainly made his al-

legation in good faith, and in light of *Berk* v. *Laird* it cannot be said that as a "legal certainty" the dollar value of what he will lose if illegally drafted is not at least $10,000.

Further, I think that we are required to give the most liberal possible readings to jurisdictional allegations in cases such as this. See *Murray* v. *Vaughn*, 300 F. Supp. 688, 694 (D. R.I. 1969); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969). For if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief. Mandamus under Section 1361 is rarely available,[5] the Selective Service System itself has neither the competence nor the power to pass on the constitutionality of procedures mandated by presidential regulations, and in this context, the concurrent jurisdiction of state courts is highly questionable. See Comment, Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officers, 53 Corn. L.Q. 916, 926-929 (1968).

Since Fein clearly can sustain his jurisdictional allegation, I need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure.

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5 Compare *Feliciano* v. *Laird*, —— F.2d —— (2 Cir., April 16, 1970), with *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2 Cir. 1968), cert. denied, 394 U.S. 929 (1969).

III. *The Merits*

Under the regulations, the State Director may appeal any classification of the local board at any time. Section 1626.1. He may attach to his appeal a statement specifying the grounds for his appeal. Section 1626.12.[6] In reviewing the appeal, the Appeal Board has the following warrant:

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

Section 1626.24(b). Apparently, it also may consider the information contained in the appellant's statement. If he deems the matter to be "in the national interest or necessary to avoid an injustice," the State Director may appeal any determination of the Appeal Board to the Presidential Appeal Board. Section 1627.1.[7]

Fein claims these procedures violate due process in that (1) they do not require that the registrant be notified of

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6 Section 1626.12 provides that:

> "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

7 The regulations provide that if there has been at least one dissent at the state level, the registrant himself may appeal. Section 1627.3. Here, however, the state board had reversed Fein's classification unanimously, and the State Director took an appeal for the registrant.

the reasons for appeal advanced by the State Director; (2) no statement of the reasons for the Appeal Board's decision is required; and (3) the registrant-appellee is given no chance to submit evidence, information or arguments to the Appeals Board.

Fein's first claim—that when the State Director, as appellant, chooses to exercise his right under Section 1626.12 to submit a statement, the registrant must be given a copy and be provided an opportunity by the Appeals Board to offer a rebuttal—is unquestionably correct. See *United States* v. *Cummings*, 425 F.2d 646 (8 Cir. 1970); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). In *Gonzalez* v. *United States*, 348 U.S. 407 (1965), the Supreme Court unequivocally stated that at least so much is required by minimum notions of due process. There, the registrant was not shown a Department of Justice recommendation on his request for conscientious objector status.[8] Reversing his conviction the Court noted:

> [A] registrant [must] be given an opportunity to rebut this recommendation when it comes to the Appeals Board, the agency with the ultimate responsibility for classification.

348 U.S. at 412. The State Director's statement on appeal, which may refer to any information on the registrant's file "which [the person appealing] believes the local board has failed to consider or to give sufficient weight," is indistinguishable from the Justice Department's recommendation under the formal procedure.

Here, however, the State Director by affidavit stated that he did not exercise his option to append a statement to his

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8 This procedure is no longer in effect, having been repealed by the Military Selective Service Act of 1967. 50 U.S.C. App. 456(j) (1964), repealed by P.L. No. 90-40, §1(7) (1967).

notice of appeal; rather his letter to the Appeal Board noted only that in his opinion Dr. Fein did not qualify for I-O status and that his opinion was based on information in Fein's file. In this posture, Fein's argument must be that due process compels the State Director to frame the issues on appeal or, in the alternative, that registrant-appellee be given an opportunity by the Appeal Board to support the local board's decision. As to the first, the government might convincingly argue that since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage.

Fein's alternative contention seems far stronger. Under the regulations, Fein, as appellee, has no right to submit anything in support of the classification below. Certainly, it would be helpful to the Board if the registrant could submit a short statement which marshals the evidence in support of his classification. Fein apparently sought permission to file such a statement with the Appeal Board, but received no response to his inquiry. If the State Director can submit a statement to support his appeal, I think fundamental fairness requires that similarly the registrant-appellee be permitted to be heard in support of the classification he has received.

Fein also argues that the Appeal Board's practice of refusing to give reasons when reversing a classification favorable to the registrant also violates due process. We have recently held that, at least when the registrant appeals, due process is not violated as long as "[t]here was sufficient evidence in the file for appellant to determine the basis for the denial of his claim." *United States* v. *Morico*, 415 F.2d 139, 143 (2 Cir. 1969), rev'd on other grounds, 39 U.S.L.W. 3520 (1970). When, however, it is the State

Director who appeals, several considerations lead me to conclude that a different standard must obtain.

First, the Appeal Board is empowered by the regulations to take cognizance of "general information concerning economic, industrial, and social conditions." Section 1626.24(b). This is an unusual provision, going well beyond the confines of judicial notice. See Preliminary Draft, Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 2-01 (March 1969).[9] Further, the registrant is not informed that the Board is in any way depending upon outside information in reaching a decision nor is he given a chance to rebut its accuracy or relevance. Although our review of a draft classification is tightly proscribed to "any basis in fact," the basis in fact must either be within the four corners of the file, see *United States* v. *Abbott*, —— F.2d —— (9 Cir., April 28, 1970) or the registrant must have been informed of any outside information which is to be considered before the Board decides and given a chance to rebut.

To my mind, the use of such information should be tightly circumscribed. Not only may this information, gathered from well-neigh any source and unchecked by any sort of rebuttal, be simply wrong, see *Bengoecha* v. *Micheli*, 295 F. Supp. 257 (D. P.R. 1969), but it might lead

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9 The Draft Rule imposes strict controls on judicial notice:

"(b) Kinds of Facts. A judicially noticed fact must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute."

Rule 2-01(b). Further, provision must be made for challenges:

"(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."

Rule 2-01(e).

to wholly invalid inferences.[10] To prevent such misinformation, I would require the Appeal Board either to disclose in advance any "general information" it thinks relevant and give the registrant a chance to rebut or else positively to disclaim any such reliance.

Second, I note that several circuits have now adopted a rule requiring that when a registrant establishes a prima facie case for conscientious objector status, the local board and the Appeal Board must state their reasons for denying the request. In *United States* v. *Houghton*, 413 F.2d 736 (9 Cir. 1969), the Ninth Circuit in reversing a conviction of a conscientious objector for failure to report, stated that

> "Inconsistent statements of actions or a finding of insincerity may support the denial of conscientious status. The local board, however, must state the reasons for the denial of a requested classification when a registrant has 'met the statutory criteria' for classi-

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10 The possibility of this latter sort of error is strong in this case. I note that Fein, in his Selective Service Form 150, stated that while an intern at a highly respected Cleveland hospital, he voluntarily chose to live in the Cleveland ghetto and contributed the very little free time he had to a neighborhood free clinic. The clinic was run by the Students for a Democratic Society. Can any court say with assurance that the Appeal Board may not have seized upon this fact and read it out of context against Fein, under its license to consider "general information about . . . social conditions?"

Even if it be assumed that Fein belonged to SDS and that an inference going to the sincerity or content of a conscientious objector claim could be drawn from the fact of active membership, I am certain that the New York State Appeal Board has no knowledge whatsoever of the principles and ideology of an SDS chapter in Cleveland more than four years ago. It goes without saying that before any inferences may be drawn, there would have to be positive proof that these tenets disqualified a subscriber from conscientious objector status, that Fein knew these tenets, and that he affirmatively embraced them. See, e.g., *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 131 (S.D.N.Y. 1969), prob. juris. noted, 38 U.S.L.W. 3253 (Dec. 10, 1969).

> fication or . . . has placed himself 'prima facie within the statutory exemption.' Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case."

413 F.2d at 739 (citations omitted). Accord, *United States* v. *Broyles*, —— F.2d —— (4 Cir., March 19, 1970) *(en banc)*.

Whether or not the local board need so state reasons whenever a prima facie case is established, see *Morico* v. *United States, supra,* I think it clear that the Appeal Board must do so when the registrant has been granted I-O status below. If in defense to a criminal prosecution for refusal to submit to induction Fein obtains judicial review of this decision, the court would be limited to the "any basis in fact" standard. This means that we would search his file to find any rationale which would support the Appeal Board's decision. In the usual case, where both bodies have rejected the registrant's claim, perhaps this approach is adequate; in any case, it is settled law that our review is so limited. But when the local board has found that the registrant is sincere in his beliefs and that his beliefs meet the statutory criteria, I think a search through the file for any rationale to support the Appeal Board is impermissible. Although the Appeal Board is nominally superior to the local board, I cannot see that its judgment, without the benefit of an interview with the registrant, is to be preferred unless accompanied by an explanation. If it does not agree with the local board, it must state in what ways

it disagrees. Otherwise, reviewing courts—as both the Fourth and Ninth Circuits have found—are blind to potential mistakes of law made by the Appeal Board in the difficult area of conscientious objector classifications.

Thus, when the State Director appeals, due process requires: first, that the registrant be given a copy of any statements the State Director submits on appeal and then be given a chance to respond; second, that the registrant be given the opportunity to submit a statement in support of his classification; third, that the Appeal Board positively disclaim any reliance on "general information" or, if it has so relied, give the registrant ample notice of the information it thinks relevant and a chance to rebut; and fourth, the Appeal Board state the rationale for any decision which reverses the local board.

I would reverse the judgment of the district court and remand with instructions that the injunction Fein seeks should issue.